SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 699

BEATRICE L. GOLDSTONE AND EUGENE L. BONDY, EXECUTORS OF THE ESTATE OF MORRIS L. GOLDSTONE, DECEASED, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX.

	Original	Print
Proceedings in U. S. C. C. A., Second Circuit	1	1
Statement under rule 13	1	1
Record from D. C. U. S., Southern District of New York	2	1
Summons	2	1
Complaint	3	2
Answer	8	6
Stipulation of Facts	10	7
Exhibit "A"—Claim for refund	14	10
Recital as to exhibits "B" and "C"	17	12
Minutes of Hearing	18	13
Opinion, Brennan, J.	20	14
Findings of Facts and Conclusions of Law	27	19
Judgment	29	20
Notice of Appeal	30	21
Designation of Contents of Record	31	22
Stipulation Re Exhibits "B" and "C," annexed to the Stipulation of Facts	33	22
Stipulation as to Record	34	23
Clerk's Certificate	(omitted in printing)	35
Opinion, Swan, J.	36	24
Order for mandate	41	28
Clerk's certificate	(omitted in printing)	43
Order allowing certiorari	44	29

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 20, 1945.

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BEATRICE L. GOLDSTONE and EUGENE L. BONDY, Executors of the Estate of Morris L. Goldstone, Deceased, Plaintiffs-Appellants,

against

THE UNITED STATES OF AMERICA, Defendant-Respondent

STATEMENT UNDER RULE 13

This action was commenced in the United States District Court for the Southern District of New York by service of a summons and complaint on March 27th, 1942.

The names of the parties appear in full above. No change has taken place in the parties or attorneys since the commencement of the action.

The answer was served on or about June 2nd, 1942.

The defendant was not arrested, no bail was taken and no property was attached or arrested. A trial was had before Hon. Stephen W. Brennan, District Judge, on the 17th day of March, 1943. No questions were referred to a Commissioner or Commissioners, Master or Referee.

Final judgment was entered on September 24th, 1943. Notice of appeal was served and filed on October 7th, 1943, and the appeal allowed on the same day.

[fol. 2] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BEATRICE L. GOLDSTONE and EUGENE L. BONDY, Executors of the Estate of Morris L. Goldstone, Deceased, Plaintiffs,

v.

THE UNITED STATES OF AMERICA, Defendant

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon Bondy & Schloss, plaintiff's attorneys, whose address is

285 Madison Avenue, New York City, an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

George J. H. Follmer, Clerk of Court. (Seal of Court).

Dated: New York, March 27, 1942.

[fol. 3] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

(Same Title)

COMPLAINT

The plaintiffs, by their attorneys, Bondy & Schloss, complain of the defendant and allege:

1. On the 23rd day of February, 1938, Morris L. Goldstone died a resident of the Village of Larchmont, County of Westchester, State of New York, within the 14th Internal Revenue District of the State of New York.

2. On the 2nd day of March, 1938, the Last Will and Testament of the said Morris L. Goldstone was duly admitted to probate in the Court of the Surrogate of Westchester County, State of New York, and to the plaintiffs above named Letters Testamentary were duly issued thereon. The said plaintiffs have duly qualified as executors thereunder and have at all times since been and still are acting as such executors.

3. An estate tax return was duly filed by these plaintiffs as executors of the said estate pursuant to Chapter 3 of Title 26 of the Code of Laws of the United States of America and such proceedings were had thereon that a tax was assessed against the said estate, and paid by the plaintiffs above named to the Collector of the 14th Internal Revenue District of the State of New York on behalf of defendant in the sum of One Hundred twenty-six thousand three hundred ninety-nine ($126,399.11) and 11/100 Dollars; and that defendant received and has the same.

[fol. 4] 4. Upon information and belief, of the said tax assessed and paid as aforesaid Five Thousand Three Hundred seventy-six ($5,376.11) and 11/100 Dollars with interest thereon from May 23, 1939, was erroneously and illegally assessed and collected by the defendant from the plaintiffs above named on the 18th day of December, 1940, and the plaintiffs above named paid the same to the defendant under protest.

5. Thereafter and on or about the 14th day of January, 1941, the plaintiffs above named did duly file with the said Collector of Internal Revenue on Form 843 of the Treasury Department of the United States a claim for refund of the said tax erroneously and illegally assessed and collected; and the said claim was rejected on or about the 14th day of February, 1941.

6. These plaintiffs show that the said tax was erroneously and illegally assessed and collected for the following reasons:

(a) On June 28, 1933, the Equitable Life Assurance Society of the United States entered into two contracts, one No. 9,168,545, by which, in consideration of the sum of Fourteen thousand three hundred fifty-seven ($14,357.08) and 08/100 Dollars then paid to it, it insured the life of the said decedent, Morris L. Gold--tone, in the sum of Eighteen thousand nine hundred twenty-eight ($18,928.00) Dollars, the said benefit to be payable upon the death of the Insured to the wife of the Insured, Beatrice L. Goldstone, if living, or to the Insured's two daughters, Dora and Betty Goldstone in equal shares, or to their survivor, if the said wife should not be living; and by the second of which, No. 9,168,544, the Insurer agreed to pay, in consideration of Twelve thousand one hundred forty-two $12,- [fol. 5] 142.92) and 92/100 Dollars then paid to it, a semi-annual annuity of Three hundred eighty-six ($386.51) and 51/100 Dollars to the said decedent during his lifetime and the sum of Six thousand seventy-one ($6,071.46) and 46/100 Dollars to his said wife, Beatrice L. Goldstone, upon his death, if she should survive him, or to his daughters, Dora and Betty Goldstone, in equal shares of their survivor, if his said wife should not survive him.

(b) At its issue the ownership of contract No. 9,168,545 was stated to be, was and continued to be in the said Beatrice L. Goldstone absolutely with right in her, at any time, and without the consent of the said Morris L. Goldstone or of any other person, to exercise any or all of the following rights with respect to the said contract: to receive or elect the disposal of any dividends declared thereon; to borrow up to the full loan value of the contract at any time pursuant to the terms thereof; to assign, pledge or transfer the said contract; to surrender the said contract to the Insurer at any time after it should have been in force for one year, and to receive, collect and possess the cash surrender value thereof; to change the beneficiary named therein; to alter the plan of insurance; excepting only that if the said Beatrice L. Goldstone should fail to surrender the said contract and collect the cash surrender value thereof during her lifetime or to assign or otherwise alienate the same, and should the said Morris L. Goldstone survive her, then ownership of the said policy, in its then value, should vest in the said Morris L. Goldstone.

(c) At the issue of contract No. 9,168,544, the same provided that the purchaser thereof was the said Beatrice L. Goldstone who might, without the consent of the said Morris L. Goldstone or any other person, [fol. 6] exercise any or all of the following rights with respect to the said contract; surrender the same to the Equitable Life Assurance Society at any date upon which an annuity payment should be due and upon such surrender receive the cash surrender value in an amount equal to the death benefit therein provided for; surrender, assign or pledge the contract and all rights thereunder or change the same to any other form or plan of contract; assign the said contract in such manner as to foreclose and exclude any rights of any beneficiary thereunder or of the said Morris L. Goldstone; receive any dividends declared upon the said contract and elect any option with respect thereto; borrow the full loan value upon the said contract; change the beneficiary under the said contract; provided only that if the said Beatrice L. Goldstone should

not during her lifetime have surrendered, assigned or otherwise alienated the said contract, then, if the said Morris L. Goldstone should survive her, all property and rights therein should vest in him.

(d) By reason of the fact that full ownership, rights, power of extinguishment and disposition of the said contracts resided solely in the said Beatrice L. Goldstone from the inception thereof, and as part of the terms thereof, and that any rights which the decedent Morris L. Goldstone might have acquired therein in the future would not have resulted from a reverter but from a voluntary grant thereof by the failure of the said Beatrice L. Goldstone to dispose of the said properties absolutely during her lifetime, neither of the said contracts nor the proceeds thereof were a part of the taxable estate of the said Morris L. Goldstone at the time of his death.

(e) The erroneous and illegal assessment hereinbefore alleged resulted from the finding by the defend- [fol. 7] ant that the proceeds of the said two contracts were a part of the taxable estate of the said decedent Morris L. Goldstone at the time of his death.

(f) The wife of the said Morris L. Goldstone, Beatrice L. Goldstone, referred to in this paragraph, survived the said Morris L. Goldstone.

7. Although due claim has been made as aforesaid and due demand made for a refund of the said erroneous and illegal assessment and collection, together with interest thereon, no part thereof has been paid.

8. There is therefore now due and owing by the defendant to the plaintiffs by reason of the premises the sum of Five Thousand three hundred seventy-six ($5,376.11) and 11/100 Dollars with interest thereon from the 23rd day of May, 1939.

Wherefore these plaintiffs demand judgment against the defendant in the said sum of Five thousand three hundred seventy-six ($5,376.11) and 11/100 Dollars with

interest thereon from the 23rd day of May, 1939, together with costs and disbursements of this action.

Bondy & Schloss, Attorneys for Plaintiffs, Office & P. O. Address, 285 Madison Avenue, Borough of Manhattan, New York City.

[fol. 8] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Same title]

ANSWER

The defendant, by its attorney, Mathias F. Correa, United States Attorney for the Southern District of New York, answering the complaint in this action:

1. Denies each and every allegation contained in paragraph "3" of the complaint, except that it admits that the plaintiffs, as Executors of the Estate of the decedent Morris L. Goldstone, filed an estate Tax return and paid taxes with respect to the said estate in an aggregate amount, including interest, of $126,399.11.

2. Denies each and every allegation contained in paragraph "4" of the complaint.

3. Denies each and every allegation contained in paragraph "5" of the complaint, except that it admits that on January 14, 1941, the plaintiffs filed with the Collector of Internal Revenue for the Fourteenth Revenue District of New York a claim for refund of the amount of $5,376.11, with interest from May 23, 1939, and that notice of rejection of the claim by the Commissioner of Internal Revenue was given the plaintiff by letter dated February 14, 1941.

4. Denies each and every allegation contained in paragraph "6" of the complaint, except that it admits that on June 28, 1933, the decedent entered into two contracts with the Equitable Life Assurance Society of the United States, numbered 9,168,544 and 9,168,545, and that the decedent's wife, Beatrice L. Goldstone, survived the decedent.

[fol. 9] 5. Denies each and every allegation contained in paragraphs "7" and "8" of the complaint, except that it

admits that no part of the sum of $5,376.11 claimed as a refund, has been refunded to the plaintiffs.

Wherefore defendant prays for judgment against the plaintiffs, dismissing the complaint, together with the costs and disbursements of this action.

Dated: New York, N. Y., May 28, 1942.

Mathias F. Correa, United States Attorney for the Southern District of New York, Attorney for Defendant. By: Dolores C. Faconti, Assistant United States Attorney, Office & Post Office Address: United States Court House, Foley Square, New York, N. Y.

[fol. 10] In United States District Court, Southern District of New York

[Same title]

Stipulation of Facts

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the following facts are conceded to be true and this stipulation may be offered and received in evidence as proof of the facts therein set forth, with the same force and effect as if independent proof were taken in respect thereto. This stipulation shall be without prejudice to the right of either party to object to the materiality of said facts and the exhibits annexed hereto or to introduce other and further evidence not inconsistent with the facts herein stipulated.

1. This is an action of a civil nature arising under the internal revenue laws of the United States instituted by the plaintiffs pursuant to Section 3772 of the Internal Revenue Code to recover the sum of $5,376.11 constituting a portion of the amount of federal estate tax and interest paid to the Collector of the Fourteenth Internal Revenue District of the State of New York on behalf of the defendant upon an assessment against the estate of Morris L. Goldstone, deceased, under Section 302 of the Revenue Act of 1926, as amended. The plaintiffs allege and the defendant denies that said taxes were erroneously and illegally as-

sessed against plaintiffs and were wrongfully and illegally collected on behalf of the defendant.

2. Morris L. Goldstone died testate on February 23, 1938, and letters testamentary were duly issued out of the [fol. 11] Surrogate's Court of Westchester County, State of New York, to the plaintiffs herein.

3. Thereafter and on or about May 20, 1939, the plaintiffs filed with the Collector of Internal Revenue for the Fourteenth District of the State of New York an estate tax return in connection with the estate of Morris L. Goldstone, deceased, disclosing an estate tax liability of $93,549.41. Said sum was paid on the date last mentioned.

4. Thereafter and in or about December, 1940, Eugene L. Bondy, one of the executors of the estate of the above-named decedent, signed a waiver of restrictions against the immediate assessment and collection of a deficiency in federal estate tax of $30,053.49. On December 4, 1940, plaintiffs paid to the Collector of Internal Revenue for the Fourteenth District of New York, on behalf of the defendant herein, said sum of $30,053.49, together with interest of $2,796.21.

5. Thereafter and on or about January 14, 1941, plaintiffs duly filed with the said Collector of Internal Revenue on Form 843 of the Treasury Department of the United States a claim for the refund of $5,376.11, with interest, comprising a portion of the deficiency tax assessment hereinabove indicated. The grounds upon which said claim for refund was predicated are contained in a rider attached to the claim. A photostatic copy of the claim for refund is annexed hereto, marked Exhibit "A" and incorporated herein by reference.

6. The facts upon which plaintiffs rely in their assertion that there was an erroneous and illegal assessment and collection of deficiency in estate tax are set forth in the following paragraphs.

[fol. 12] 7. On June 29, 1933, The Equitable Life Assurance Society of the United States entered into a contract bearing number 9168543, by which it insured the life of the late Morris L. Goldstone in the sum of $18,928, in consideration of the issuance of a check in the sum of $14,357.08

by the decedent to said company. On July 27, 1933, the contract aforesaid was rewritten without substantial change. A photostatic copy thereof is annexed hereto, marked Exhibit "B" and incorporated herein by reference.

8. On June 29, 1933, and simultaneously with the execution of contract numbered 9168545, The Equitable Life Assurance Society of the United States entered into another contract, bearing number 9168544, by which it agreed, among other things, to pay a semi-annual annuity of $386.51 to the late Morris L. Goldstone during his lifetime, in consideration of the issuance of a check in the amount of $12,142.92 by the decedent to said insurance company. Said contract was rewritten on August 17, 1933, but no substantial changes were made. A copy thereof is annexed hereto, marked Exhibit "C", and is incorporated herein by reference.

9. The insurance company aforesaid did not require a physical examination of the decedent preliminary to the execution of contract number 9168545, Exhibit "B", but accepted policy numbered 9168544, Exhibit "C", in lieu thereof.

10. At the time of the said demise of Morris L. Goldstone neither of the contracts hereinbefore described had been assigned by Beatrice L. Goldstone, and were still in full force and effect. No loans or charges of any kind whatsoever had been made or placed against the same, nor had any of the other privileges therein provided been availed of by any of the parties interested therein.

[fol. 13] 11. On or about February 14, 1941, plaintiffs' claim for refund, Exhibit "A", was rejected in writing by the Collector of Internal Revenue for the Fourteenth District of New York on behalf of the defendant herein.

12. The instant suit was instituted by the service of a summons and complaint upon the defendant herein on or about March 27, 1942.

13. No part of the plaintiffs' said claim has been assigned or transferred and no part thereof has been repaid to the plaintiffs.

Dated: New York, N. Y., December —, 1942.

Bondy & Schloss, Attorneys for Plaintiffs; Mathias F. Correa, United States Attorney.

[fol. 14] EXHIBIT "A", ANNEXED TO FOREGOING STIPULATION OF FACTS

Form 843

Treasury Department, Internal Revenue Service

(Revised April, 1940)

Claim

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

(Stamped:) Received—Filed Jan. 22, 1941. Estate Tax. (Date received:) Jan. 14, 1941. Collector Int. Rev., 14th Dist. of N. Y. Collector's Stamp.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

X Refund of Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

[fol. 15] STATE OF NEW YORK,
County of New York, ss:

Name of taxpayer Beatrice L. Goldstone and Eugene L. Bondy, Executors of the Estate of Morris L. Goldstone

Business address 285 Madison Avenue New York City New York

Residence 41 Beach Avenue, Larchmont, New York, and 6 Brookdale Avenue, New Rochelle, New York, respectively.

The deponents being duly sworn according to law, depose and say that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Third District, New York.

2. Period (if for income tax, make separate form for each taxable year) from ....., 19 .. to ....., 19 ..

3. Character of assessment or tax Estate tax.

4. Amount of assessment, $30,053.49; dates of payment $13,423.52 on Dec. 4, 1940 and $19,426.18 on Dec. 18/40.

5. both payments included interest from 5/23/39.

6. Amount to be refunded (besides interest from May 23rd, 1939) $5,376.11.

7. Amount to be abated (not applicable to income or estate taxes)

8. The time within which this claim may be legally filed expires, under Section 910 of the Internal Revenue Code on December 18th, 1943.

[fol. 16] The deponent verily believes that this claim should be allowed for the following reasons:

(See Rider Attached)

(Attach Letter-size Sheets if Space Is Not Sufficient)

(Signed) Beatrice L. Goldstone, Eugene L. Bondy, Executors of the Estate of Morris L. Goldstone.

Sworn to and subscribed before me this 11th day of January, 1941. Bertram W. Felenstein, (Signature of Officer Administering Oath), Bertram W. Felenstein, Notary Public, N. Y. Co. No. 45, Reg. No. 1-F-6. Cert. filed in Bronx Co. No. 3, Reg. No. 3-F-41. Cert. filed in Kings Co. No. 3, Reg. No. 1025. Certificate filed in Westchester County. Commission expires March 30, 1941.

(Rider)

This amount sought to be recovered is the estate tax assessed in the Estate of Morris L. Goldstone who died February 23, 1938, a resident of Westchester County, New York, upon the theory that the proceeds of two contracts with the Equitable Life Assurance Society numbered 9,168,544 and 9,168,545 in the respective amounts of $6,193.97 and $18,987.73, constituted a part of the decedent's estate. The Executors assert the assessment was erroneously made and that these moneys were not a part of the decedent's estate. The grounds of the Executors' contention are:

[fol. 17] 1. That the total ownership and unrestricted beneficial interest in these contracts was the property not of

the decedent, but of his wife, Beatrice L. Goldstone, by the terms of both contracts from their inception;

2. That, by the terms of both contracts, the said Beatrice L. Goldstone had the unrestricted right at any time during the life of the decedent to exercise all powers with respect to both the said contracts, including the right to surrender either contract or both to the issuing company and cancel the same and receive and retain the full surrender value or consideration thereof;

3. That, at no time after the date of the issuance of the said contracts on June 28, 1933, did the decedent have any rights in either of the contracts or in their proceeds or any control over either of them;

4. That Beatrice L. Goldstone was at all times the owner and possessor of the contracts;

5. That they constituted no part of decedent's estate.

The Executors named above are still acting as Executors of the said Estate and file this claim as such.

EXHIBIT "B", ANNEXED TO FOREGOING STIPULATION OF FACTS

(Omitted pursuant to Stipulation)

EXHIBIT "C", ANNEXED TO FOREGOING STIPULATION OF FACTS

(Omitted pursuant to Stipulation)

[fol. 18] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil 17-456

[Same Title]

MINUTES OF HEARING

Before: Hon. Stephen W. Brennan, District Judge, New York, March 17, 1943; 10:30 o'clock a. m.

Appearances:

Bondy & Schloss, Esqs., Attorneys for the Plaintiff; Eugene L. Bondy, Esq., of Counsel. Mathias F. Correa, Esq., United States Attorney, for the Government; by Arnold C. Stream, Esq., Assistant U. S. Attorney.

Mr. Bondy: May I submit the pleadings to your Honor?

The Court: Yes. Gentlemen, you may proceed. As I understand it, the facts are going to be stipulated. You may make your record in any way you see fit.

Mr. Bondy: May I offer in evidence the stipulation of fact which has been signed by the District Attorney and by the attorneys for the plaintiff.

The Court: The clerk may mark the exhibit.

(Marked Plaintiff's Exhibit 1.)

[fol. 19] Mr. Bondy: Plaintiff's Exhibit 1 contains all of the facts which both sides consider essential to a decision of the issues, with one exception, and that is the amount. I understand that the District Attorney is willing to stipulate that the amount of the alleged refund as prayed for in Exhibit 1, attached to Exhibit 1, constituting part of Exhibit 1, is the correct amount.

In other words, that if there should be a decree for the plaintiff, the judgment for the plaintiff will be in the amount prayed for, is that correct?

Mr. Stream: Yes, that is correct.

The Court: Could I have the amount of that in the record so I won't be confused later on?

Mr. Bondy: Yes, sir. The amount is $5,376.11, besides interest from May 23, 1939.

Mr. Stream: That is right.

The Court: That is the original record?

Mr. Bondy: The original stipulation signed by both sides, and that is the record, if your Honor is willing to be content with that.

I think I can outline the point involved very briefly.

(Discussion off the record.)

Mr. Bondy: April 1st to file briefs?

The Court: You have exchanged briefs now, have you?

Mr. Bondy: Yes.

The Court: Reply briefs to be filed by April 1st.

Mr. Bondy: That is satisfactory.

The Court: That is satisfactory as far as the Court is concerned.

Mr. Stream: It may be well to file them several days in advance. You may be on your way back to Utica.

The Court: If I go home in the meantime, mail them to me at Utica.

[fol. 20] In United States District Court, Southern District of New York

[Same Title]

Appearances:

Bondy & Schloss, Attorneys for Plaintiff, 285 Madison Avenue, New York City. Hon. Mathias F. Correa, United States Attorney, United States Court House, New York City, Attorney for Defendant; Arnold C. Stream, Assistant United States Attorney, of Counsel.

Argued Mar. 17, 1943; Submitted April 1, 1943; Decided July 17, 1943. Brennan, Judge.

Opinion

The executors of the Estate of Morris L. Goldstone bring this action under the provisions of the Internal Revenue Code to recover $5376.11, being a portion of the federal estate tax assessed against and paid by the Estate of Morris L. Goldstone, deceased.

The facts are not in dispute and are contained in a stipulation duly executed and filed with the Clerk.

On June 29, 1933, upon the application of decedent, the Equitable Life Assurance Society of the United States

issued two contracts in the form of life insurance policies, one in the amount of $18,928.00, payable upon the death of Morris L. Goldstone, referred to therein as the "In-
[fol. 21] sured", to the Insured's wife, Beatrice L. Goldstone, if living, or in the event of her prior death to the two daughters of the Insured.

The second policy may be termed an "annuity contract" and provides for the semi-annual payment of $386.51, to the decedent, who is designated as the "Annuitant", during his lifetime, and upon his death for the payment to his wife, Beatrice L. Goldstone, if living, the sum of $6,071.46; or, in the event of her prior death to the two daughters of the Annuitant.

Both policies were re-written without substantial change within two months from the date of their original issue.

The consideration of the first policy was the single premium payment by the decedent of $14,357.08. The consideration for the issuance of the second policy was a single premium payment by the decedent of $12,142.92.

In the first policy Beatrice L. Goldstone is designated as the "Owner" and in the second policy she is designated as the "Purchaser".

The policies provide in substance that the rights of the Owner and Purchaser should pass to Morris L. Goldstone upon the death of Beatrice L. Goldstone, and should the beneficiaries, his wife and two daughters, predecease him, then the benefits accruing upon his death should be paid to his estate.

In both policies the rights to receive dividends, surrender the policies, change beneficiaries, sign and pledge the contracts, were vested in the "Owner" or "Purchaser", during her lifetime and upon her death were passed to the "Insured" or "Annuitant".

The policies were issued at the same time. Morris L. Goldstone was then about sixty-three years of age and no physical examination of the decedent preliminary to the issuance of the contracts was required.

[fol. 22] The controversy herein arises by reason of the inclusion of the proceeds of both policies in the taxable estate of the decedent and the levying of an estate tax thereon, which was paid under protest. Application for a refund was made and the application was denied.

Plaintiffs contend that the inclusion of the proceeds of the two policies in the gross estate of the decedent was

error, as each contract at its inception was complete in itself; the decedent held no property rights therein during his lifetime, and the beneficiary received no greater right or interest in the contracts by reason of his death.

The government contends that the issuance of the policy was an *inter vivos* transfer by the decedent to the beneficiary, "* * * intended to take effect in possession or enjoyment at or after his death", and therefore, taxable under the provisions of Section 302 (c) of the Revenue Act of 1926, as amended.

Both parties agree that the contracts created no insurance risk and that such contracts were not "insurance" within the meaning of the Internal Revenue Code, so that the provisions of Section 302 (g) referred to in the briefs may be discarded as inapplicable.

Helvering v. LeGierse, 312 U. S. 531

There remains only to be decided the question as to whether the tax was legally levied under the provision of 302 (c) of the Internal Revenue Act.

Plaintiffs urge that the total ownership and unrestricted beneficial interest in these contracts was the property of the wife, Beatrice L. Goldstone, and was not and never was the property of the decedent; and is, therefore, not taxable, and they cite a number of cases where the question of taxation turned upon a finding of at least one of the indicia of ownership in the decedent. They seek to distinguish the case of Helvering v. Hallock, 309 U. S. 106, upon the [fol. 23] ground that in the instant case there could be no "right of reverter" in the contracts or their proceeds, because there never was an ownership therein by the decedent, and, therefore, any title that the decedent might have received by reason of the prior death of his wife was a new title, and in no sense is the right of reverter applicable in this case.

The plaintiffs have placed too much importance upon the use of the word "reverter". Even if we assume it to be true that the decedent never had legal ownership of the contracts, none the less, he used the contracts as a media through which he transferred a part of his estate to certain beneficiaries, the full enjoyment of which was delayed until his death. Technically, the decedent may not have had a "right of reversion" in the insurance contracts, because of the absence of prior ownership therein, but he did own that

part of his estate which purchased the insurance contracts, and if any interest therein could come to him by reason of any contingency, then it comes squarely within the doctrine of Helvering v. Hallock, Supra.

The purpose and breadth of the applicable statute is concisely stated in Helvering v. Hallock, 309 U. S. 106 at 114:

> "They relied on the governing principle of Section 302 (c) that Congress meant to include in the gross estate *inter vivos* gifts 'which may be resorted to, as a substitute for a will, in making dispositions of property operative at death'."

Here were inter vivos gifts made in such a manner as to act as exact substitutes for a will, for, by the investment in or purchase of the insurance contracts, the donor provided for the transfer of about $25,000 of his estate to the natural objects of his bounty.

The defendant argues that the gift was of the policies, not of the purchase price or the amount payable at death, [fol. 24] but if we look beyond the "conveyancer's device" —and we are cautioned to look to substance, not form. Helvering v. Hallock, Supra—we find the policies were the means used to accomplish the transfer of a part of the estate of the decedent.

> "Obviously, the word "transfer" in the statute of the privilege which may constitutionally be taxed, cannot be taken in such a restricted sense as to refer only to the passing of particular items of property directly from the decedent to the transferee. It must, we think, at least include the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another."
>
> *Chase National Bank* v. *United States*, 278 U. S. 327 at 337.

Was the transfer intended to take effect in possession or enjoyment at or after death? The "owner" or "purchaser" may have had possession and the legal ownership of the policies after their issuance, but she did not have the possession or enjoyment of the fund transferred by the *inter vivos* act. She could have obtained the possession and enjoyment of a part thereof by a surrender of the contracts during the lifetime of the decedent. But to argue that the

purpose of the investment was to provide a present fund for the beneficiary is to ignore the basic purpose of the investor. It was the death of the insured which completed the shifting of economic benefit of the property transferred.

> "The death of Mrs. Clise caused a shifting or the completion of a shifting of an economic benefit of property, which is the subject of a death tax. Chase Ntl. Bank v. United States, 278 U. S. 327, 338. 49 S. Ct. 126, 73 L. Ed. 405, 63 A. L. R. 388. We quote from [fol. 25] Klein v. United States, 283 U. S. 231, 234, 51 S. Ct. 398, 399 75 L. Ed. 996: 'It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effects its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed'."
>
> *Commissioner of Internal Revenue* v. *Clise*, 122 Fed. 2nd 998 at 1003.

The death of the "Insured" and "Annuitant", "• • • became the 'generatir source' of important and definite accessions to the property rights" of the beneficiary.

Tyler v. *United States*, 281 U. S. 497 at 504.

The plaintiffs confuse the requirement under Section 302-g of an indicia of ownership as a basis for taxation, with the elements necessary to find a taxable event under Section 302-c.

> "Section 302-c deals with property not technically passing at death but with interests theretofore created. The taxable event is a transfer *inter vivos*. But the measure of the tax is the value of the transferred property at the time when death brings it into enjoyment."
>
> *Helvering* v. *Hallock*, 309 U. S. 106 at 110-111.

The above case is authority for the taxing of the proceeds of the insurance policies under the provisions of Section 302-c upon the theory that the transfer was akin to a testamentary disposition, and that by reason of the language of the contracts, the decedent held in suspense the ultimate disposition of the property until the moment of his death.

[fol. 26] See also:

Helvering v. *LeGierse*, 312 U. S. 531;
Chase National Bank v. *United States*, 116 Fed. 2nd 625;
Comr. Internal Revenue v. *Washer*, 127 Fed. 2nd 446;
Comr. Internal Revenue v. *Flanders*, 111 Fed. 2nd 117;
Bailey v. *United States*, 31 Fed. Sup. 778;
Mearkles' Estate et al. v. *Comr. Internal Revenue*, 129 Fed. 2nd 386.

The complaint herein is dismissed.

Stephen W. Brennan, United States District Judge.

[fol. 27] In United States District Court, Southern District of New York

Civ. 17-456.

[Same Title]

Findings of Facts and Conclusions of Law—Filed August 5, 1943

The above-entitled action having come on for trial before the undersigned on the 17th day of March, 1943, and the proof of both parties having been adduced, and the plaintiffs having appeared by Bondy & Schloss, Esqs. (Eugene L. Bondy, Esq., of counsel), and the defendant having appeared by Mathias F. Correa, United States Attorney for the Southern District of New York (Arnold C. Stream, Assistant United States Attorney, of counsel), and the undersigned having filed an opinion on July 21, 1943, dismissing the complaint, I now make the following findings of fact and conclusions of law:

Findings of Fact

1. The facts contained in the stipulation dated December 29, 1942, and filed herein, are hereby incorporated herein and found as the facts in this action.

2. I further find that the amount of $5,376.11, with interest as set forth in the complaint, is the amount which would be payable to the plaintiffs by the defendant if the cause of action stated in the complaint were sustained.

CONCLUSIONS OF LAW

I. This Court has jurisdiction over the parties and subject matter of this action.

[fol. 28] II. All requirements that are conditions precedent to the institution of this action have been met.

III. The sum of $5,376.11, constituting a portion of the amount of federal estate tax and interest paid to the Collector of the Fourteenth Internal Revenue District of the State of New York upon an assessment against the Estate of Morris L. Goldstone, deceased, which is the sum sought to be recovered in this action, was properly assessed as estate taxes and collected from the plaintiffs in accordance with law.

Accordingly, I direct that judgment be entered in favor of the defendant herein, dismissing the complaint, together with the costs and disbursements of this action.

Dated, Albany, N. Y., August 4, 1943.

Stephen W. Brennan, U. S. D. J.

[File endorsement omitted.]

[fol. 29] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civ. 17-456

[Same Title]

JUDGMENT—Filed September 24, 1943

The issues in the above entitled action having duly come on for trial before Honorable Stephen W. Brennan, United States District Judge, without a jury, on the 17th day of March, 1943, and the plaintiffs having appeared by Bondy & Schloss, Esqs. (Eugene L. Bondy, Esq., of counsel), and the defendant having appeared by Mathias F. Correa, United States Attorney for the Southern District of New York (Arnold C. Stream, Assistant United States Attorney, of counsel), and the proof of both parties having been adduced, and the Court having filed an opinion on July 21,

1943 dismissing the complaint, and on August 4, 1943 having made its findings of fact and conclusions of law,

Now, on motion of James B. M. McNally, United States Attorney for the Southern District of New York, Attorney for the defendant, it is

Ordered, Adjudged and Decreed that the complaint herein be and the same hereby is dismissed on the merits, and that the United States of America recover of Beatrice L. Goldstone and Eugene L. Bondy, Executors of the Estate of Morris L. Goldstone, deceased, % Bondy & Schloss, Esqs., 285 Madison Avenue, Borough of Manhattan, City and State of New York, the plaintiffs herein, the sum of $20.00 costs as taxed, and that the defendant have execution therefor.

New York, N. Y., September 24th, 1943.

George J. H. Follmer, Clerk.

[fol. 30] In United States District Court, Southern District of New York

Civ. 17-456

[Same Title]

Notice of Appeal

Sirs:

Notice is Hereby Given that Beatrice L. Goldstone and Eugene L. Bondy, Executors of the Estate of Morris L. Goldstone, Deceased, the plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Second Circuit from the judgment entered in the above proceeding on the 24th day of September, 1943, and from each and every part thereof.

Dated: New York, September 27th, 1943.

Bondy & Schloss, Attorneys for Plaintiffs, Office & P. O. Address, 285 Madison Avenue, Borough of Manhattan, City of New York.

To: Clerk of the United States District Court for the Southern District of New York, James B. M. McNally, United States Attorney, Southern District of New York, Attorney for Defendant, United States Courthouse, Foley Square, New York City.

[fol. 31] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

DESIGNATION OF CONTENTS OF RECORD

SIRS:

Plaintiff-appellant hereby designates, pursuant to Rule LXXV of the Rules of Civil Procedure, the following portions of the record, proceedings and evidence to be contained in the record on appeal:

1. Statement pursuant to Rule 13.
2. Notice of Appeal.
3. Complaint.
4. Answer.
5. Stipulation of Facts.
6. Minutes of testimony.
7. Findings of fact and conclusions of law.

[fol. 32] 8. Judgment.

9. Opinion of Court below.

Dated: New York, N. Y., November 16, 1943.

Yours, etc., Bondy & Schloss, Attorneys for Plaintiff-Appellant, Office & P. O. Address, 285 Madison Avenue, Borough of Manhattan, City of New York.

To: James B. McNally, United States District Attorney, Southern District of New York, Attorney for Defendant, United States Courthouse, Foley Square, New York City.

George J. H. Follmer, Clerk of the United States District Court for the Southern District of New York.

[fol. 33] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Same Title]

STIPULATION RE EXHIBITS "B" AND "C", ANNEXED TO THE STIPULATION OF FACTS

It Is Hereby Agreed, with the appended consent of the Clerk of this Court, that Exhibits B and C annexed to the stipulation of facts, consisting of contracts of the Equi-

table Life Assurance Society of the United States, numbered 9,168,545 and 9,168,544 respectively, need not be printed as part of the record on appeal inasmuch as the greater part thereof is deemed to be irrelevant on the appeal, but that photostat copies of the same in triplicate shall be supplied to the Court and filed with the record as a part thereof.

Dated: New York, January 31st, 1944.

Bondy & Schloss, Attorneys for Plaintiffs-Appellants.

James B. M. McNally, Attorney for Defendant-Respondent.

[fol. 34] In United States District Court, Southern District of New York

[Same Title]

Stipulation as to Record

It Is Hereby Stipulated and Agreed that the foregoing is a true transcript of the record of the District Court in this case, as agreed on by the parties.

Dated: New York, February 17th, 1944.

Bondy & Schloss, Attorneys for Appellants. James B. M. McNally, United States Attorney.

[fol. 35] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 36] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1943

No. 358

Argued May 26, 1944. Decided August 11, 1944

BEATRICE L. GOLDSTONE and EUGENE L. BONDY, Executors of the Estate of Morris L. Goldstone, Deceased, Plaintiffs-Appellants,

v.

THE UNITED STATES OF AMERICA, Defendant-Appellee

Before L. Hand, Swan and Frank, Circuit Judges

Appeal from the District Court of the United States for the Southern District of New York

Action by executors of Morris L. Goldstone to recover an alleged overpayment of part of the federal estate tax paid by them. From a judgment dismissing the complaint after trial, the plaintiffs appeal. Judgment affirmed.

Bondy & Schloss, Attorneys for appellants; Eugene L. Bondy, of counsel.

James B. M. McNally, United States Attorney, for appellee; Marvin M. Notkins, Assistant United States Attorney, of counsel.

[fol. 37] SWAN, Circuit Judge:

The question presented by this appeal is whether the proceeds of two contracts, which matured upon the death of Morris L. Goldstone and were payable to his widow, were properly included as part of his gross estate under the provisions of section 302(c) of the Revenue Act of 1926, as amended, Int. Rev. Code § 811(c).

The facts are not in dispute. The decedent died testate on February 23, 1938. Nearly five years before, in June 1933, he had caused The Equitable Life Assurance Society of the United States to issue two contracts for which he paid sums aggregating $26,500. One contract insured his life in the sum of $18,928 payable upon his death to his wife Beatrice, or, in case of her prior death, to his two

daughters, or, if none of the named beneficiaries survived him, to his executors or administrators. The consideration for the issuance of this policy was a single premium of $14,357.08 paid by check of the decedent. This policy was issued without a physical examination of the "insured", who was then 63 years of age. In lieu of a physical examination he was required to purchase the second contract. This was an annuity contract. It provided for the semi-annual payment of $386.51 to the "annuitant", who was the decedent, during his life, and for the payment upon his death of $6,071.46 to his wife Beatrice, or, if she were not living, to his two daughters, or, if they also were dead, to his executors or administrators. The consideration for the annuity contract was a single premium payment of $12,142.92 made by the decedent. By the terms of each contract the wife had the power to assign it, to borrow money on it, to receive dividends, to change the beneficiaries, and to surrender the contract and obtain the surrender value thereof. If she should die before the "insured" or "annuitant", these powers passed to him. She survived her husband and had not alienated or surrendered either con-[fol. 38] tract. Under the contracts she was entitled to receive as beneficiary from Equitable Life Assurance Society the annuity death benefit of $6,071.46, the face value of the life policy, $18,928, and accumulated dividends of $182.24, a total of $25,181.70.

Upon the foregoing facts the Commissioner of Internal Revenue determined that the sums payable to the decedent's widow pursuant to the two contracts were includable in his estate for purposes of the estate tax. This increased by $5,376.11 a deficiency assessment which the executors paid. A claim for refund thereof having been rejected they brought the present suit and have appealed from an adverse judgment.

It is conceded that the two contracts must be considered together and, so considered, they imposed no insurance risk upon the promisor; hence section 302(g) of the Revenue Act of 1926, Int. Rev. Code § 811(g), relating to amounts receivable "as insurance under policies taken out by the decedent upon his own life" is inapplicable. *Helvering* v. *Le Gierse*, 312 U. S. 531. Both parties agree that the question is whether the proceeds of the contracts are taxable against the decedent's estate under section 302(c), Int. Rev.

Code 811(c), the material portions of which are printed in the margin.*

[fol. 39] The district court answered the question in the affirmative upon the authority of *Helvering* v. *Hallock*, 309 U. S. 106. That case, following *Klein* v. *United States*, 283 U. S. 231, held that trusts wherein the settlor retained a contingent reversionary interest terminating with his death should be included in the settlor's estate for taxation under § 302(c) because they were transfers "intended to take effect in possession or enjoyment at or after death". In *Chase National Bank* v. *United States*, 116 F. 2d 625, we applied the *Hallock* case to insurance proceeds where the insured had retained a possibility of reverter in the event of his beneficiary's predeceasing him, holding that when the death of the insured terminates rights of his estate to receive payment under the policy and fixes them unalterably in the beneficiary, the proceeds must be added to the insured's estate for taxation under § 302(g). A few months later the opinion in *Helvering* v. *Le Gierse*, *supra*, decided that the proceeds of a life policy issued under circumstances similar in general to those in the case at bar, were taxable against the decedent's estate as a transfer under § 302(c),

---

* Sec. 811. Gross Estate.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property * * *

(c) *Transfers in Contemplation of, or Taking effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, * * * intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *"

and not as insurance under § 302(g). These authorities, read together, appear to control the case at bar. See also *Commissioner* v. *Washer*, 127 F. 2d 446 (C. C. A. 6), cert. den. 317 U. S. 653; *Mearkle's Estate* v. *Commissioner*, 129 F. 2d 386 (C. C. A. 3); *Commissioner* v. *Clise*, 122 F. 2d 998 (C. C. A. 9), cert. den. 315 U. S. 821.

The appellants urge, however, that the extensive powers conferred upon the wife by the contracts here under consideration distinguish their case from those above cited and compel an opposite result. It is true that none of the beneficiaries there had powers like those conferred upon the wife here. By surrendering the annuity contract at any time she could have gotten the same sum as though the annuitant had died; and by surrendering the life policy she could have obtained its surrender value, which at the [fol. 40] instant before the insured's death was only $5,072.71 less than the amount payable to her upon his death. It is argued that the wife should be regarded as unconditional owner of the contracts, or at least of so much of the proceeds as she might have drawn at will under them. But the argument does not convince us. The law of taxation, as set forth in the cases above cited, looks to the unrealized possibility of reverter and concludes that where a possibility of reverter remains, the transfer takes effect only upon death. The husband's death terminated all his rights and enlarged those of his wife. No part of the proceeds which the wife received came to her through the exercise of her powers under the contracts. At the moment of her husband's death the powers expired and became a nullity. *Cf. Johnson* v. *Snyder*, 142 N. E. 877 (Ind. App.); *Leaming* v. *Huffman*, 124 A. 704 (N. J. Ch.); *Supreme Colony United Order of Pilgrim Fathers* v. *Towne*, 89 A. 264 (Conn.). His death was the operative fact which matured the promisor's duty to pay "and became the 'generating source' of important and definite accessions to the property rights" of the wife. See *Tyler* v. *United States*, 281 U. S. 497, 504. If the powers are significant for any purpose, they merely add to the remoteness of the contingency upon which the *Hallock* doctrine depends. We agree with the Sixth Circuit that it is idle to differentiate the *Hallock* case on such ground because the Supreme Court "was in search of a guiding principle depending not upon illusive and subtle distinctions, but one which should be uniform and workable

in the application of the estate tax." *Commissioner* v. *Washer, supra,* at page 449.

The judgment is affirmed.

[fol. 41] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of August one thousand nine hundred and forty-four.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Jerome N. Frank, Circuit Judges.

BEATRICE L. GOLDSTONE, & ANO., as Executors, etc., Plaintiffs-Appellants,

v.

UNITED STATES, Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell Clerk, By A. Daniel Fusaro, Deputy Clerk.

[fol. 42] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Beatrice L. Goldstone, et al., etc., v. United States. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 28, 1944. Alexander M. Bell, Clerk.

[fol. 43] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 44] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 12, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 49,152. U. S. Circuit Court of Appeals, Second Circuit. Term No. 699. Beatrice L. Goldstone and Eugene L. Bondy, Executors of the Estate of Morris L. Goldstone, Deceased, Petitioners, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed November 24, 1944. Term No. 699, O. T. 1944.

FILE COPY

No. 699

Office - S... U. S.
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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

BEATRICE L. GOLDSTONE and EUGENE L. BONDY, Executors of the Estate of Morris L. Goldstone, deceased,

Petitioners,

against

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI AND BRIEF ANNEXED THERETO.

BEATRICE L. GOLDSTONE,
EUGENE L. BONDY,
Petitioners.

INDEX

PAGE

Petition for a Writ of Certiorari 1

Brief in Support of Petition for a Writ of Certiorari 7

Statement 7

Plaintiff's Contention 7

Law 10

CASES CITED.

Bingham v. United States, 296 U. S. 211 11

Chase National Bank v. United States, 116 Fed. [2d] 625 9

Chase National Bank v. United States, 278 U. S. 327 ..... 5, 11, 13

Griffiths v. Helvering, 308 U. S. 355 12

Helvering v. Hallock, 309 U. S. 106 ..... 4, 9, 13

Helvering v. Le Gierse, 312 U. S. 531 9

Klein v. United States, 283 U. S. 231 13

May v. Heiner, 281 U. S. 238 11

Reinecke v. Northern Trust Company, 278 U. S. 339 13

Saltonstall v. Saltonstall, 276 U. S. 260 13

Shukert v. Allen, 273 U. S. 545 11

Tyler v. United States, 281 U. S. 497 ..... 12, 13

STATUTES CITED.

1942 Amendment of I. R. C. 811, subdivision (g) 9

IN THE

Supreme Court of the United States

BEATRICE L. GOLDSTONE and EUGENE L. BONDY, Executors of the Estate of Morris L. Goldstone, deceased,

Petitioners,

against

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Beatrice L. Goldstone and Eugene L. Bondy respectfully shows:

1. They are citizens of the State of New York.

2. As executors of the Will of the late Morris L. Goldstone, under administration in the Surrogate's Court of Westchester County, State of New York, they brought this suit against the United States of America to recover an alleged overpayment of estate taxes on their estate, assessed erroneously, as they assert, by the Commissioner of Internal Revenue.

3. The action was commenced by the service of a summons and complaint in the United States District Court, Southern District of New York, on March 27th, 1942. Issue was joined on June 2nd, 1942. Trial was had on March 17, 1943, before Hon. Stephen W. Brennan, District Judge,

who filed his opinion (Record, p. 20) on August 5th, 1943; whereupon judgment was entered on September 24, 1943 (Record, p. 29), dismissing the complaint on the merits.

Appeal was taken by the plaintiffs to the Circuit Court of Appeals for the Second Circuit on September 27th, 1943 (Record, p. 30). Briefs were filed and the cause was argued orally on May 26th, 1944. The judgment of the District Court was unanimously affirmed by an order of the Circuit Court of Appeals filed August 28th, 1944, upon a unanimous decision dated August 11, 1944.

4. These petitioners seek a writ directing that the record be certified to this honorable court for review on the ground that the judgment of the Circuit Court of Appeals necessarily implies, and the decision of that court clearly announces, a doctrine that perverts the fundamental basis for the taxation of decedents' estates. We will show briefly that the court below has disregarded the "passing of an economic benefit" as a ground for estate taxation and has substituted in its place a tax on a change in mere insubstantial legal theory. We believe this is at variance with the consistent pronouncements of the Supreme Court. We submit that the decision, if remaining uncorrected, will be a source of confusion as well as, in the case at bar, an injustice.

5. The facts are all stipulated (Record, pp. 10-13). The important Exhibits B and C, annexed to the fact stipulation, were not printed below. Photostatic copies were supplied the court by agreement (Record, pp. 17, 33). The same practice is being followed here at the suggestion of the Clerk of this Court.

6. The decedent died on February 23rd, 1938. On June 29, 1933, the Equitable Life Assurance Society of the United States issued two contracts. They were rewritten within two months but "without substantial change" (Rec-

ord, p. 12, pars. 7 and 8). Each contract was bought by a single premium, paid by check of the decedent. The decedent's wife became from the outset—not by transfer, but as a matter of original issue—the owner of both contracts, as will be shown below. Whether the payment of the single premium by decedent's check was a mere convenience, or whether his money actually paid the premium, seems to be unimportant since no claim is made of a transfer in contemplation of death. One contract insured the decedent's life; the other was an annuity. No physical examination of decedent was required.

7. The wife survived the decedent.

8. The following are the essential characteristics common to both contracts:

(a) The wife is originally named as owner ("Purchaser" in the annuity contract No. 9,168,544; "Owner" in the insurance contract No. 9,168,545); and that designation was never changed.

(b) The wife might, without the consent of the decedent, indeed without any restraint whatever, surrender the contracts at any time and receive to her own unrestricted use the proceeds (in the case of the annuity contract the full death benefit [No. 9,168,544, middle of first page]; in the case of the insurance contract, the surrender value); or she might freely pledge or assign them or either of them or, subject only to the approval of the Equitable, change the form of contract (No. 9,168,544 at pp. 1, 2; No. 9,168,545 at pp. 4, 5).

(c) The wife might unrestrictly change the beneficiary (No. 9,168,544 at p. 3; No. 9,168,545 at p. 4).

(d) Free of restraint, she might capture the dividends and borrow on the security of the contracts (No. 9,168,544 at p. 3; No. 9,168,545 at pp. 3 and 5).

(e) When the life policy became an endowment, she might collect to her own use the amount thereof (No. 9,168,545 at p. 3).

(f) She might without restriction elect a mode of settlement (No. 9,168,544 at p. 5; No. 9,168,545, rider).

(g) *The decedent and all other persons are specifically excluded from all rights in the contracts,* if the wife exercised her privilege of assigning them (No. 9,168,544 at p. 2; No. 9,168,545 at p. 4).

(h) *Only if the wife should not have surrendered or assigned the contracts* would ownership of them pass (not revert, for he never owned them) to the decedent upon the wife's dying before him (No. 9,168,544 at p. 2; No. 9,168,545 at pp. 2, 4).

9. Thus the husband-decedent had no right in *praesenti* or *in futuro* in either contract; no possibility of reverter, for he never owned them, hence had never parted with them; no expectancy that did not depend on the free grace of his wife. If she chose not to assign or surrender the contracts he might entertain a hope of one day possessing them as her survivor, very much as a beneficiary named in a will might during the testator's lifetime hope for a legacy if the testator should not revoke.

10. The decedent did not retain "the right to the income from the property" (I. R. C. sec. 811 (c)) since all income from the insurance policy belonged to the wife and the annuity contract sharply separated the death benefit (which the wife might capture at any time during the husband's life—see middle of p. 1 of No. 9,168,544) from the fund that yielded him an annuity.

11. For all these reason we urge that the doctrine of *Helvering* v. *Hallock* (309 U. S. 106) does not apply; that there was not only no property passing from the husband

on his death, but that, on the contrary, had the wife died first the contracts, if unimpaired, would have constituted gross assets of her estate (*Chase National Bank* v. *United States*, 278 U. S. 327; Stone, J., at top of p. 335).

12. It is submitted that the last paragraph of the opinion of Swan, Circuit Judge, in writing for affirmance of the judgment in the case at bar, announces an erroneous and dangerous doctrine which this court should correct. He recognizes that the wife might have realized, without hindrance, substantially the same amount during her husband's lifetime as she took after his death. His death brought no substantial increase in her "economic benefits". But, says the court (italics not in original):

> "No part of the proceeds which the wife received came to her *through the exercise of her powers under the contracts.* At the moment of her husband's death the powers expired and became a nullity. * * * His death was the operative fact which matured the promisor's duty to pay 'and became the "generating source" of important and definite accessions to the property rights' of the wife."

If we read this aright, it proclaims that not the passing of an economic benefit but the change in the legal description of the benefit is the basis of estate taxation. We believe this is contrary to the doctrine uniformly sustained by this court.

A brief memorandum on the law is submitted, attached to this petition.

WHEREFORE these petitioners pray that a writ issue to the United States Circuit Court of Appeals for the Second Circuit directing the certification to this court of the record and all proceedings upon appeal in this action that the

same may be here reviewed and any errors corrected and that a writ of certiorari in proper manner may be granted.

November 21st, 1944.

Respectfully submitted,

Beatrice L. Goldstone

Eugene L. Bondy

Petitioners.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

BEATRICE L. GOLDSTONE and EUGENE L. BONDY, having been duly sworn, depose as follows:

They are the petitioners in the foregoing petition. They have read the same and know the contents thereof. The allegations therein are true to their knowledge except as to assertions of opinion; and as to assertions of opinion, they believe them to be true and justified.

Beatrice L. Goldstone

Eugene L. Bondy

Sworn to before me this
21st day of November, 1944.

Helen Wasserman

Notary Public
N. Y. Co. No. 199, Reg. No. 109-W-5
Cert. Filed in Bronx Co. No. 3, Reg. No. 22-W-5
Cert. Filed in Kings Co. No. 11, Reg. No. 124-W-5
Commission Expires March 30, 1945

Supreme Court of the United States

BEATRICE L. GOLDSTONE and EUGENE L. BONDY, Executors of the Estate of Morris L. Goldstone, deceased,

Petitioners,

against

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Statement

The petitioners seek to review an order of the Circuit Court of Appeals for the Second Circuit affirming by unanimous vote a judgment of the United States District Court for the Southern District of New York which dismissed the plaintiffs' complaint on the merits.

The chronology of the proceeding is set forth in paragraph 3 of the petition.

The plaintiffs, as executors, paid to the Collector of Internal Revenue a tax of $123,602.90 on the estate of the decedent, of which $5,376.11 was paid on December 4, 1940 under protest. A claim for refund was duly filed (Rec. p. 11) and was rejected (Rec. p. 13). It is to recover this latter payment that the suit was brought.

Plaintiff's Contention

These petitioners, as plaintiffs, urged that the Commissioner erred in including in the gross estate of the decedent

the proceeds of two contracts issued by Equitable Life Assurance Society of America and more particularly described in the petition. The basis of their argument was (a) that the decedent had never owned either contract; (b) that his wife who survived him had been the absolute owner of both contracts from their origin; (c) that as the absolute owner of those contracts she might at any time during the life of the decedent have utterly destroyed them by surrendering them and taking to her own use their avails without requiring the concurrence or consent of the decedent or of anyone else and that at all times she possessed the unrestricted subsidiary rights of pledging the contracts, borrowing on their security, assigning them, changing the beneficiaries and, subject to the rules of Equitable Life Assurance Society, changing the forms of the contracts, etc.; (d) by the terms of the contracts, only if she died before the decedent without having exercised her rights to capture the proceeds of the contracts would any property therein vest (not revest) in the decedent; and (e) that, by the specific provision of the contracts, an assignment of either of them by her would grant an interest superior to any rights which might later accrue to anyone but the assignee.

Citations to the pages of the contracts substantiating these various characteristics are set forth in the petition. Photostatic copies of the contracts are supplied at the suggestion of the clerk of this court since, by stipulation below, the contracts were not printed at length in the record but copies thereof handed to the judges at the oral argument.

These petitioners pointed out before the Circuit Court of Appeals that an instant before the death of the decedent, the wife, by her free and untrammeled surrender of the annuity contract, could have received from the Equitable the precise amount which was payable to her as beneficiary after death (Annuity contract No. 9,168,544, middle of first page); and that at the same time or, at any time before her

husband's death, she could have collected, beyond the power of anyone to hinder her, the total surrender value of the insurance contract (No. 9,168,545).

Both contracts were written at the same time, almost five years before the decedent's death. No physical examination was required and they therefore probably cannot be technically considered insurance (*Helvering* v. *Le Gierse*, 312 U. S. 531); but no question arises, we think, which would make this fact significant since the death of the decedent occurred before the 1942 Amendment of I.R.C. 811, subdivision (g).

The Circuit Court of Appeals, in its opinion (144 Fed. [2d] 373), recognized all of the foregoing but thought that it was still compelled by *Helvering* v. *Hallock*, 309 U. S. 106, to consider these proceeds part of the decedent's gross estate (Swan, J., at p. 374). That court had already extended the holding in the *Hallock* case, which was concerned with possibilities of reverter in *inter vivos* trusts, to life insurance policies (*Chase National Bank* v. *United States*, 116 Fed. [2d] 625). Congress has provided otherwise in the meanwhile by the 1942 Amendment of I.R.C. 811 (g). Starting from its own holding in the *Chase* case as a point of departure, Judge Swan, while recognizing that neither the life tenant in the *Hallock* case nor the beneficiary in the *Chase National Bank* case would have had the power here enjoyed by the wife of totally blotting out the contracts during the life of the Hallock life tenant or the beneficiary in the *Chase* case, nevertheless thought that these distinguishing features should have no effect upon the result. Thus Judge Swan at page 375:

> "* * * It is true that none of the beneficiaries there had powers like those conferred upon the wife here. By surrendering the annuity contract at any time she could have gotten the same sum as though the annuitant had died; and by surrendering the life policy she could have obtained its surrender value, which at the instant before the insured's death was only $5,072.71 less than

> the amount payable to her upon his death. It is argued that the wife should be regarded as unconditional owner of the contracts, or at least of so much of the proceeds as she might have drawn at will under them. But the argument does not convince us."

And following this the Court clearly sets forth the reasons which we paraphrase to be that any property which the recipient had in as good title before the death of the decedent as afterwards is nevertheless a part of the decedent's gross estate *if only the theory by which it is acquired is altered at the death.* Thus, at page 375:

> "* * * No part of the proceeds which the wife received came to her through the exercise of her powers under the contracts. At the moment of her husband's death the powers expired and became a nullity. Cf. Johnson v. Snyder, 82 Ind. App. 215, 142 N. E. 877; Leaming v. Huffman, 96 N. J. Eq. 249, 124 A. 704; Supreme Colony United Order of Pilgrim Fathers v. Towne, 87 Conn. 644, 89 A. 264, Ann. Cas. 1916B, 181. His death was the operative fact which matured the promisor's duty to pay 'and became the "generating source" of important and definite accessions to the property rights of the wife. * * *"

We submit that this is in conflict with the uniform holding of this court that taxation of estates is a practical matter having to do with realities and concerned with the passing of economic value rather than with fine-spun theories by which the economic benefits may be described.

Very briefly, and with no attempt at argument, we point to our references to the law:

Law

A.

Where no ownership in property resides in the decedent at the time of his death, it cannot be considered in computing his gross estate.

May v. *Heiner*, 281 U. S. 238;
Shukert v. *Allen*, 273 U. S. 545.

B.

This applies as well to insurance contracts. Where no power of realization remains with the decedent, the proceeds of the policy are no part of his gross estate.

Bingham v. *United States*, 296 U. S. 211.

C.

On the contrary he is the owner of the policy who has the power to surrender and cancel it.

Chase National Bank v. *United States*, 278 U. S. 327.

There the present Chief Justice wrote at page 335:

> "A power in the decedent to surrender and cancel the policies, to pledge them as security for loans and the power to dispose of them and their proceeds for his own benefit during his life which subjects them to the control of a bankruptcy court for the benefit of his creditors (Cohen v. Samuels, 245 U. S. 50, 62 L. ed. 143, 38 Sup. Ct. Rep. 36; see Burlingham v. Crouse, 228 U. S. 459, 57 L. ed. 920), 46 L. R. A. (N. S.) 148, 33 Sup. Ct. Rep. 564), and which may, under local law applicable to the parties here, subject them in part to the payment of his debts (N. Y. Domestic Relations Laws, chap. 14, Consol. Laws Sec. 52; Kittel v. Domeyer, 175 N. Y. 205, 67 N. E. 433; Guardian Trust Co. v. Straus, 139 App. Div. 884, 123 N. Y. Supp. 852, affirmed in 201 N. Y. 546, 95 N. E. 1129), is by no means the least substantial of the legal incidents of ownership. * * *"

D.

The wife, then, who survived the decedent, having at all times been the absolute owner of the economic benefit, it formed no part of his gross estate merely because his death

permitted her to take as beneficiary what, both before and after his death, she might have taken by reason of her contract rights without let or hindrance.

Thus, in *Tyler* v. *United States*, 281 U. S. 497, Mr. Justice Sutherland wrote at page 503:

> "Taxation, as it many times has been said, is eminently practical, and a practical mind considering results, would have some difficulty in accepting the conclusion that the death of one of the tenants in each of these cases did not have the effect of passing to the survivor substantial rights in respect to the property, theretofore never enjoyed by such survivor."

The Court there had before it the taxability of an interest in property held by the entirety upon the death of one of the spouses. The property was taxable because only by the death the surviving spouse (p. 504)

> "* * * became entitled to the exclusive possession, use and enjoyment. * * *"

Here, of course, the same quality and quantity of title, no more and no less, was enjoyed before as after the death.

The constant need for holding the interpretation of the taxing statutes to realities, instead of to insubstantial legal concepts, is thus expressed by Mr. Justice Frankfurter in *Griffiths* v. *Helvering* (308 U. S. 355) at page 357:

> "We cannot too often reiterate that 'taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid.' *Corliss* v. *Bowers*, 281 U. S. 376, 378, 74 L. ed. 916, 917, 50 S. Ct. 336. And it makes no difference that such 'command may be exercised through specific retention of legal title or the creation of a new equitable but controlled interest, or the maintenance of effective benefit through the interposition of a subservient agency."

Among numerous other expressions may be cited the following: Mr. Justice Stone at the end of p. 346 of *Reinecke* v. *Northern Trust Company*, 278 U. S. 339; at pp. 336, 338 and 339 of *Chase National Bank* v. *United States*, 278 U. S. 327 and at p. 271 *Saltonstall* v. *Saltonstall*, 276 U. S. 260; Mr. Justice Sutherland at p. 503 of *Tyler* v. *United States*, 281 U. S. 497 and at p. 234 of *Klein* v. *United States*, 283 U. S. 231; Mr. Justice Frankfurter at p. 118 of *Helvering* v. *Hallock*, 309 U. S. 106.

We urge that the decision below offends by taxing the alteration of a legal theory rather than the shifting of an economical benefit.

Respectfully submitted,

BONDY & SCHLOSS,
Attorneys for Petitioner.

EUGENE L. BONDY,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 699

BEATRICE L. GOLDSTONE and EUGENE L. BONDY, Executors of the Estate of Morris L. Goldstone, Deceased,

Petitioners,

v.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

BONDY & SCHLOSS,
Attorneys for Petitioners,
285 Madison Avenue,
New York City.

EUGENE L. BONDY,
of Counsel.

INDEX

	PAGE
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
The Contracts	
Insurance policy	3
The "annuity"	5
The Holding below	6
Specification of Errors	7
Summary of Argument	7
Argument	8
I Constitutional Restraints	8
II No transfer Intended to Take Effect at or after Death	9
(a) Strictly no transfer; hence no reversion	9
(b) No tie to property held by decedent	10
(c) Property taxable to wife's estate, had she died first	17
(d) *Helvering* v. *Hallock* inapplicable	17
(e) No question of remoteness involved	19
III No right to income in decedent	19
Conclusion	23
Appendix I Statute, Section 302(c) of Revenue Act of 1926, as amended	24
Treasury Regulation 80, Art. 17	24
Treasury Regulation 80, Art. 18	26
Appendix II Pertinent provisions of insurance contract	28
Appendix III Pertinent provisions of "annuity" contract	32

PAGE

Bingham v. United States, 296 U. S. 211 ..... 9, 16
Chase National Bank v. United States, 278 U. S. 327 ..... 11, 16, 17
Clise v. Commissioner, 41 B. T. A. 820; 122 Fed. (2nd) 998 22
Commission v. Estate of Ballard, 47 B. T. A. 784; 138 Fed. (2nd) 512 18
Commissioner v. Field, No. 8, Law. ed., Adv. Op. 514 (1945) 13
Computing Scale Co. v. Toledo, etc., 279 Fed. 648 10
Fidelity-Philadelphia Trust Co. v. Rothensies, No. 8, Law. ed., Adv. Op. 511 (1945) 13
Helvering v. Hallock, 309 U. S. 106 ..... 14, 17, 18
Helvering v. St. Louis Union Trust Co., 296 U. S. 39 14
Helvering v. LeGierse, 312 U. S. 531 ..... (note) 9
Helvering v. Wood, 309 U. S. 344 9
Henry v. Commissioner, B. T. A. Docket #109513 (unreported) 19
Klein v. United States, 283 U. S. 231 12
Lloyd's Estate v. Commissioner, 141 Fed. (2nd) 758 18
Matter of Kohler, 193 App. Div. (N. Y.) 8 22
Matter of McComb, 4 Bradf. 151 22
May v. Heiner, 281 U. S. 238 ..... 8, 11, 18
Mayer v. Reinecke, 130 Fed. (2nd) 350 17
Milliken v. United States, 283 U. S. 15 15
New York Trust Co. v. Eisner, 256 U. S. 345 8
Peek v. United States, 38 Fed. Supp. 826 22
Saltonstall v. Saltonstall, 276 U. S. 260 16
Tyler v. United States, 281 U. S. 497 12
United States v. Jacobs, 306 U. S. 363 12
Whitney v. State Tax Commission, 309 U. S. 530 .. 15

MISCELLANEOUS

Paul, Federal Estate and Gift Taxation (vol. 1, pp. 293, 297) 15
Report of Senate Finance Committee, Revenue Act of 1932 22

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Opinions Below

The opinion of the United States District Court for the Southern District of New York (R. 14) is reported in 52 Fed. Supp. 704. The opinion of the Circuit Court of Appeals (R. 24) is reported in 144 Fed. 2d 373.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on August 28, 1944 (R. 28). The petition for a

writ of certiorari was filed on November 24, 1944, and was granted on February 12, 1945 (R. 29). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13th, 1925.

Question Presented

Whether, for the purpose of calculating an estate tax, the "death benefits", payable to the decedent's wife under two contracts (one for insurance on the decedent's life and the other a so-called annuity, the death benefit being practically separable from the decedent's annuity), issued concurrently by an insurance company to the decedent's surviving wife almost five years before his death and never owned by the decedent, form part of the decedent's gross estate where (1) at any time during the decedent's life the wife might, as to either or both of the contracts, have freely and unrestrictedly surrendered, assigned, pledged or amended them, taking the proceeds as her sole property, but where (2), if the wife, while still retaining any interest in the contracts, had died before the decedent, that interest would have passed to the decedent.

The Statutes Involved

The question is on the interpretation of Section 302 (c) of the Revenue Act of 1926, as amended [Internal Revenue Code, Sec. 811 (c)]. It is printed (the pertinent parts in italics) with the related Regulations beginning with page 24, *infra*.

Statement

All the facts are stipulated (R. 7, 13) and so found (R. 19). They are:

The death of the decedent, Morris L. Goldstone, occurred on February 23, 1938 (R. 8), and the petitioners are his executors.

On June 29, 1933, the Equitable Life Assurance Society ("the Society") issued two contracts, each for a single premium then paid. Both contracts were "rewritten", one on July 27, 1933, and the other on August 17, 1933; but it is agreed that such rewriting did not involve any "substantial change" (R. 8, 9). One contract insured the life of the decedent. The other had certain annuity features. As both will be analyzed immediately below, a further description at this place would merely lead to repetition.

The insurance company did not require a physical examination of the decedent in writing the life policy in view of the simultaneous issue of the annuity contract (R. 9).

The decedent's wife (designated Purchaser of one contract and Owner of the other) survived the decedent and had not availed herself of any of the rights (described below) with which the contracts invested her (R. 6, at par. 4; R. 9, at par. 10). Both contracts were in full force and effect at his death.

The Commissioner included the amounts payable to the wife under both contracts in the decedent's gross estate. The petitioners paid the resulting tax under protest and, their claim for refund having been rejected (R. 9, at par. 11), they instituted the present suit to recover the amount, $5,376.11 with interest (R. 13).

The Contracts

By stipulation, photostatic copies of each of the two contracts will be handed to the Court. Those portions which the petitioners regard as pertinent are printed for the Court's convenience in appendices 2 and 3 at pages 28 and 32, *infra*.

The insurance policy. The Society, for a consideration of $14,357.08, a single premium paid by the decedent's

check, agreed to pay upon the death of the decedent the sum of $18,928.00 to certain beneficiaries named in a special provision attached opposite the Second Page of the policy, *i. e.*, to his wife, if then living, or otherwise to his two daughters.

The wife is designated as the Owner throughout the contract. It was issued to her and not to the decedent. By it she had these broad powers:

(a) To change the beneficiary without the consent of the decedent (lower half of Fourth Page);

(b) To surrender the contract or assign or pledge it, all without the consent of the decedent or of any beneficiary or of any possible subsequent owner, or she might change the form or plan of insurance. An assignment by her would "operate to exclude any and all rights of the insured, special beneficiary or any subsequent successive owner under this policy * * *" (lower half of Fourth Page);

(c) Upon her surrender of the contract she might herself receive the specified cash value (middle of Fifth Page);

(d) She might borrow from the Society on the security of the policy (top of Fifth Page);

(e) She might exercise the option of having the dividends paid in cash to her or accumulate them at interest to purchase additional insurance, and, in any case, receive the cash to her own use or surrender the additional insurance and receive its value to her own use (Third Page);

(f) She might elect a mode of settlement.

If the contract should not have been surrendered or assigned, pledged or otherwise alienated by her during her lifetime, then upon her death, the decedent still surviving, he would have become the owner in her stead (Clause "Successive Owners" at top of Second Page).

The wife survived the decedent without having exercised her rights to surrender, assign, alter or encumber the policy.

The annuity. This was issued to the wife for a single premium of $12,142.92, paid by the decedent's check, and combined several features.

The wife is described throughout as the Purchaser of the contract and in her reside the important rights summarized below; but a stated annuity of $386.51 per annum was to be paid to the decedent during his life, subject to the reduction noted below. Upon the death of the decedent (referred to in the contract as the Annuitant) a so-called "Death Benefit" of $6,071.46 was to be paid to the wife; but this she might obtain at any time during the decedent's life, without his consent or any condition whatsoever, upon her surrendering the contract.

The wife (Purchaser) had the following inherent rights:

(a) To surrender the contract to the Society "without the consent of the Annuitant or beneficiary" at any date upon which an annuity payment should be due whereupon the Society would "pay to the Purchaser (the wife) the cash surrender value of an amount equal to the Death Benefit" and issue a separate annuity contract to the decedent by which for the balance of his life he would receive an annuity of $280.26 a year instead of the $386.52 provided in the original contract (beginning at lower half of First Page);

(b) Subject only to the Society's approval, to "change to another form or plan of contract";

(c) Change the beneficiary or assign the contract (top of Second Page);

(d) Receive to her own use the dividends or allow them to accumulate (top of Third Page);

(e) Borrow money on the security of the contract (middle of Third Page);

(f) Choose a mode of settlement (Fifth Page);

(g) By assigning the contract, exclude any and all rights of any beneficiary or Annuitant under the contract" unless the wife (Purchaser) should choose to reacquire it (Upper half of Second Page).

If the wife should not exercise her rights to change, assign, surrender or otherwise alienate or burden the contract during her lifetime, then, if the decedent should have survived her, he would have acquired her rights (top of Second Page). The surviving wife had not changed, surrendered, assigned or encumbered the contract.

The Holding Below

The Circuit Court of Appeals recognized that none of the beneficiaries in the cases which it thought governed its decision "had powers like those conferred upon the wife here" (R. 27); and it summarizes, immediately following this sentence, some of her rights under the contracts which we have noted above. Notwithstanding them, however, it considered that the decedent had an "unrealized possibility of reverter" and that therefore his death "terminated all his rights and enlarged those of his wife." Although full proceeds of the contracts were available to her without her husband's consent during his lifetime,

> "No part of the proceeds which the wife received came to her through the exercise of her powers under the contract" (R. 27).

This last sentence, we submit, embodies a substantial error, placing the emphasis as it does, not upon the passing of an economic benefit, but upon a change in legal terminology as the basis for taxation.

Specification of Errors to be Urged

The Circuit Court of Appeals erred:

(1) In holding that the proceeds of the two contracts were part of the decedent's gross estate;

(2) In holding that the widow's ownership of the contracts was incomplete during the decedent's life but that she held them by virtue of a transfer of them to her "intended to take effect in possession or enjoyment at or after his death";

(3) In affirming the judgment of the District Court.

Summary of Argument

The estate tax, being constitutional only as an excise upon the passing of the decedent's property, can apply only to that in which he had an interest at his death. Section 811(c) of the Internal Revenue Code enumerates the circumstances by which a decedent who has transferred property in his lifetime still retains an interest in it at his death sufficient to retain it within the orbit of the taxing power. Where, as here, no *right* rests in him to acquire in the future an interest in the property at his own volition, or to control its disposition, or to be vested with it upon the happening of any contingency, or to enjoy the income from it, he has no property interest in it at his death which can justify the application of the taxing statute. A possibility of benefit, depending not upon a contingency no matter how remote nor upon his own volition but solely upon the uncontrolled whim of an adverse party, is no tie to the property which his death serves to sever.

Argument

The proceeds of the contracts cannot be included in the decedent's gross estate since at his death he had neither property rights in them nor control over them nor any future interest which his death served to release.

I.

The estate tax statute, being justified under Article I, Section 9, of the Constitution only as an excise or duty upon the devolution of a decedent's property, cannot be construed as applying to an item in which the decedent had no recognizable rights.

New York Trust Co. v. *Eisner,* 256 U. S. 345.

Section 302(c) of the Revenue Act of 1926 sets forth those ties which, if retained by a decedent who has transferred an interest in his property during his life, will render the property a part of his gross estate at his death for estate tax purposes.

If the transfer has left in the decedent no relationship to the property which only his death will suffice to sever, there is nothing to which the tax can apply.

May v. *Heiner,* 281 U. S. 238.

If, however, a transfer, instead of being absolute, was not "to take effect in possession or enjoyment" before his death or if he *retained* the possession or enjoyment of it or the *right* to the income from it for his life or for a period ascertainable only with reference to his death or for a period in fact not ending before his death, there are outstanding ties which permit the inclusion of the property in his gross estate at death.*

Did any of these ties exist?

* There is no contention that there was here a transfer in contemplation of death, or that a right was reserved to designate beneficiaries.

II

The decedent had not made a transfer "intended to take effect in possession or enjoyment at or after his death."

In support of this we urge these considerations:

(a) The contracts had never been the property of the decedent. They were originally issued to the wife. Where there is no transfer, there can be no reversion or possibility of reverter or chance of *revesting* of what has never been divested. In the words of Mr. Justice Douglas in *Helvering* v. *Wood*, 309 U. S. 344, at page 347:

> **"For, generally speaking, the power to revert or to revoke an existing estate is discretionary with the donor; a reversion is the residue left in the grantor on determination of a particular estate."**

True the checks of the husband paid the single premium (R. 8, 9, fol. 12) when the contracts were issued almost five years before his death. If that transaction was taxable it was as a gift. The question whether what the money bought was always the absolute property of the wife is not affected. The District Judge went so far as to conclude, apparently, that any *inter vivos* transfers of insurance policies* by a man "to the natural objects of his bounty" are to be condemned "as exact substitutes for a will" (R. 17). We submit the law does not support this (*Bingham* v. *United States*, 296 U. S. 211, 217). A gift tax, in case of an absolute transfer, might be laid, but the estate tax statute could not be invoked.

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* The lower court noted (R. 25) that no question of insurance was involved. *Helvering* v. *LeGierse*, 312 U. S. 531, seems to have largely lost its significance since the $40,000 insurance credit was erased by the Revenue Act of 1942. It was never important here, the $40,000 credit having already been absorbed. And the amendment of section 302(g) by section 404(a) of the Revenue Act of 1942 by which controlling importance is attached to who pays insurance premiums, the grantor or the grantee, would not here apply, even if the contracts dealt with insurance: the amending Act is expressly prospective (subd. (c) of the amending statute).

If it be argued, however, that the gift of the consideration for the contracts is equivalent to a gift of the contracts, the question remains whether there can be a reversionary interest in the contracts of which the decedent was never the owner. Basically, had the decedent any rights in them which were relaxed by his death?

(b) The title in the wife did not rest uncompleted until the decedent's death.

The wife was the absolute owner from the creation of the contracts. Without repeating here her rights summarized at pages 4-6, *supra*, it is enough to recall that she possessed the sole power, without the approval of the decedent or anyone else, to surrender the contracts at any time during the decedent's life and appropriate the surrender value—specified by table in the life policy; in the annuity contract, the full "death benefit"—to her own use. Likewise, subject only to the Society's approval, she might change the annuity "to another form or plan of contract" or surrender it and thus stop the annuity. When she chose to take any of these steps, the contracts as such would become extinct. The decedent had no right to prevent. What he had was at best a hope that, if he outlived her, he might not nevertheless have been excluded by her free act.

> "Property may be classified as real or personal or mixed, and as tangible or intangible. But the right in property of all classes is one, and consists ultimately of this, and only of this—the right to exclude others."

(Baker, C. J., at page 671 of *Computing Scale Co.* v. *Toledo Computing Scale Co.*, 279 Fed. 648, cert. den. 257 U. S. 657.)

The right to exclude was hers and never the decedent's.

Was the court below, under these circumstances, justified in regarding "possession or enjoyment" postponed?

We are aware that the decisions of this Court clearly display a tendency to recognize a constantly more tenuous relationship of a decedent to property transferred by him in his lifetime as sufficient to defer its "possession or enjoyment" by the transferee until his death. A detailed review of the cases illustrating the progressive diminishing of the required tie would doubtless be of no help, so recent have been the latest developments. A brief account should serve.

In *May* v. *Heiner* (281 U. S. 238) the decedent had created a living trust with two successive life estates, of which the settlor was to enjoy the second.* At the termination of the two lives, the corpus vested in the settlor's children. The corpus was excluded from the settlor's gross estate upon her death, Mr. Justice McReynolds writing at page 243 for the unanimous Court:

> "At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed."

This bald statement of the rule seems to have been unquestioned. But the need for further interpretation arose where less than full interest in the property had been "definitely fixed".

In *Chase National Bank* v. *United States*, 278 U. S. 327, the decedent had procured an insurance policy on his life, with benefit payable to another and had reserved the right to change the beneficiary. No authority was lodged in anyone but the decedent to alter the policy. Mr. Justice Stone stated the question to be whether

> "the termination at death of that power [to change the beneficiary] and the consequent passing to the designated beneficiaries of all rights under the policies freed of the possibility of its exercise may be the legitimate subject of a transfer tax."

* Of course, the Joint Resolution of March 3, 1931, would have dictated a different result if then applicable; but the fundamental conception seems unaffected.

On this he had to say at page 335:

> "A power in the decedent to surrender and cancel the policies, to pledge them as security for loans and the power to dispose of them and their proceeds for his own benefit during his life which subjects them to the control of a bankruptcy court for the benefit of his creditors (Cohen v. Samuels, 245 U. S. 50, 62 L. ed. 143, 38 Sup. Ct. Rep. 36; see Burlingham v. Crouse, 228 U. S. 459, 57 L. L. ed. 920, 46 L. R. A. (N. S.) 148, 33 Sup. Ct. Rep. 564), and which may, under local law applicable to the parties here, subject them in part to the payment of his debts (N. Y. Domestic Relations Laws, chap. 14, Consol. Laws, Sec. 52; Kittle v. Domeyer, 175 N. Y. 205, 67 N. E. 433; Guardian Trust Co. v. Straus, 139 App. Div. 884, 123 N. Y. Supp. 852, affirmed in 201 N. Y. 546, 95 N. E. 1129), is by no means the least substantial of the legal incidents of ownership, and its termination at his death so as to free the beneficiaries of the policy from the possibility of its exercise would seem to be no less a transfer within the reach of the taxing power than a transfer effected in other ways through death."

In *United States v. Jacobs*, 306 U. S. 363, the tie that was severed by the death of the decedent was his joint ownership of the property with his wife.

In *Klein* v. *United States*, 283 U. S. 231, a life estate in real property was granted to the wife, her acquisition of the fee being conditioned upon her surviving the grantor. As SUTHERLAND, J. remarked at page 234:

> "Nothing is to be gained by multiplying words * * *. It is perfectly plain that the death * * * brought the larger estate into being."

Tyler v. *United States*, 281 U. S. 497, had to do with an estate by the entirety. In the words of Mr. Justice SUTHERLAND, only upon the husband's death

> "she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will."

This Court has recently re-announced the test. Thus in *Fidelity-Philadelphia Trust Company* v. *Rothensies*, decided on February 5, 1945 (Reported in Law. ed. Advance Opinions No. 8, at p. 511), where the question was as to the value for tax purposes of the property, Mr. Justice Murphy justified the application of the estate tax in these words:

> "* * * Thus until the moment of her death or until an undetermined time thereafter the decendent held a string or contingent power of appointment over the total corpus of the trust. The retention of such a string, which might have resulted in altering completely the plan contemplated by the trust instrument for the transmission of decedent's property, subjected the value of the entire corpus to estate tax liability" (p. 513).

And further:

> "* * * It is enough if he retains some contingent interest in the property until his death or thereafter, delaying until then the ripening of full dominion over the property by the beneficiaries * * *" (p. 513).

In the companion case of *Commissioner* v. *Field*, decided the same day and printed at page 514 of the same Advance Sheets, Mr. Justice Murphy expressed it as follows:

> "* * * Decedent retaining a string attached to all the property until death severed it, the entire corpus was swept into the gross estate and was taxable accordingly" (p. 515).

Not so clear was the situation where, although a complete present title was transferred, a possibility remained that, upon a contingency, the subject of the transfer might revert to the transferror. By a divided Court, a trust corpus, of which the settlor's daughter was to have the life estate with remainder over provided the daughter outlived the settlor, but with a reversion to the settlor if the daughter died before him, was declared a part of the set-

tlor's gross estate upon his death (*Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39).

The present Chief Justice, in his dissenting opinion in that case, foreshadowed the next step, writing at page 47:

> "He did not wish to make a complete gift. He wished to keep the property for himself in case he survived his daughter. He kept this hold upon it by reserving from his gift an interest, terminable only at his death, by which full ownership would be restored to him if he survived his daughter."

The next step was *Helvering* v. *Hallock* where the minority view in the *St. Louis Union Trust* case became definitely the position of the Court. There (309 U. S. 106), in three typical cases, nothing remained to complete the transfers as such in the decedent's lifetime; but there was a provision that upon a contingency the title, now fully out of his ownership, might revert to him. This was deemed (by a divided Court) to delay the "possession or enjoyment" until the grantor's death.

We believe a still further advance has been made in the *Fidelity-Philadelphia Trust Company* case, cited on page 13, *supra;* for where, in his dissenting opinion in the *St. Louis Union Trust Co.* case, Chief Justice Stone thought "the *value of that interest* [a contingent reverter] was rightly subjected to the tax" (p. 46) and "the *extent to which it is incomplete* marks the extent of the 'interest' passing at death, which the statute taxes" (p. 47), it has now been declared that includible in the gross estate is not only "the extent of the 'interest' " but the entire *res* of which the interest was a calculable part.

Further, we believe, the Court has not gone.

Can it proceed further, subjecting to the taxing power assets of the decedent transferred during his life with no power of recall, no expectation of revesting upon a contingency, with nothing but a hope in the generosity of one

with an adverse interest? Would not such a holding depart from the province of levying an excise on property passing from a decedent and amount to an invasion of the forbidden field of a direct tax upon property without reference to population?

Summing up the substance of the law on this subject the learned author of Paul, *Federal Estate and Gift Taxation* (1942), has this to say (Vol. 1, p. 293, par. 7.04):

> "The principle is generally accepted that under an estate tax something must be transferred, or pass, or terminate at death to serve as a justification for the excise tax taken from the estate."

Recognizing the rapidly expanding area covered by the Court's progress, he adds at page 297 of the same volume (par. 7.05):

> "In other words, we may soon come to a day when the estate tax is interpreted as placing a death tax upon all property once in a generation."

That day, so far as the books show, is not yet here (Cf. Frankfurter, J., at p. 538 of *Whitney* v. *State Tax Commission*, 309 U. S. 530).

The gift tax, supplementing its related estate tax, can close all gaps without resorting to a distortion of the latter into something banned by the Constitution. This has been frequently recognized.

> *Milliken* v. *United States*, 283 U. S. 15; Stone, J., at page 23.

Returning to the facts here presented it will be profitable to compare positions just prior to the decedent's death and immediately after that event.

At any time prior to his death, by the wife's uncontrollable act, she could have surrendered the annuity contract and received the sum of $6,071.46, the precise amount which was available to her after his death.

So just before his death she could have surrendered the life contract and obtained the full surrender value which, with accumulated dividends, amounted to $14,037.53. True, the face of the policy was $18,928; but the discrepancy between the value of the policy, when it matured by his death, and the surrender value prior to his death, does not reflect upon the quality of her title: where a policy is wholly owned by one other than decedent, no part of the proceeds forms part of the latter's estate even though the incident of the death may increase the value of the asset. (*Bingham* v. *United States*, 296 U. S. 211).

It is "the shifting of the economic benefits of the property which is the real subject of the tax." (STONE, J. at p. 338, *Chase Nat. Bank* v. *United States*, 278 U. S. 327).

> "Taxation, as it many times has been said, is eminently practical * * *." (SUTHERLAND, J. at p. 503 in Tyler v. United States, 281 U. S. 497.)
>
> *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 270.

This outlook upon taxation would seem to be at variance with the view of the court below which moved it to approve the tax in the instant case. It wrote that, even though the economic benefits were recognized as the same before and after the death of the husband,

> "No part of the proceeds which the wife received came to her through the exercise of her powers under the contracts". (R. 27).

Although the economic benefit was not shifted by his death, the Circuit Court of Appeals thought, as we understand it, that the proceeds were taxable only because a different legal nomenclature was permissible.

We submit that this is a technical consideration which does not even approach the inquiry. If the test is whether the husband at the time of his death had any rights to prevent a realization by the wife of the full benefits of the contracts and if it appears that he had none, the property

can form no part of his estate merely because the title, already absolutely in the wife, received a new name at his death.

(c) What was unrestrictedly available to the wife was her property and not his. A strong illumination is cast upon the problem, we think, by considering the result in this case if the wife had died before the husband. It seems clear that these contracts would have formed part of her gross estate under subdivision (a) of section 811 of the Internal Revenue Act; for it has never been doubted that what is available to a decedent at the time of death is as much an asset of the estate as if it had been reduced to possession.

Mayer v. *Reinecke*, 130 Fed. (2d) 350.

It is *her* death that would have cut the tie.

> "* * * And the nonexercise of the power may be as much a disposition of property testamentary in nature as would be its exercise at death." (STONE, J., in Chase National Bank v. United States, 278 U. S. 327 at p. 358.)

And compare in this connection the words of the Chief Justice in the same case at p. 335, quoted on p. 12, *supra*.

This conclusion in itself must exclude the property from the decedent's estate.

(d) The decision is not controlled by *Helvering* v. *Hallock*, 309 U. S. 106.

That case has had a powerful influence in drawing into its wake situations to which it may never have been intended to apply. The pattern specifically before the court was that of an *inter vivos* trust for the benefit of A for life with remainder to B if surviving or, if not, to the grantor. There would be no reversion unless the grantor survived the remainderman. By the prior death of the grantor, the possibility of a reversion was extinguished; and this tie which was cut at the grantor's death, freeing the property from the possibility of reverting, was held to

be such a retention of an interest in the property by the grantor as brought it within the purview of Section 811, subdivision (c).

Was it the intention of the Court to abandon wholly the line of opinion of which *May* v. *Heiner,* 281 U. S. 238, may represent the broad basis and to include in a gross estate property for which the decedent, while having no control over it or future legal right depending on any happening, might yet have entertained impotent hopes?

If the answer is affirmative, the results are astounding. Parallel would be the instance where the decedent at his death was named the specific legatee in the will of one yet living, conditioned upon his surviving the testator, of a jewel he had once presented to the testator. Here too his "right" would depend upon a contingency (survivorship) and a hope (failure of the testator to revoke the legacy or to alienate the subject of the legacy before death). Is the inchoate bequest a part of the decedent's estate? The answer seems obvious. No more substantial seems the relation of this decedent to the property, depending as it did upon his surviving his wife and her choosing to remain inactive in destroying the substance of the contracts.

The Circuit Court of Appeals from which this record has been certified seems itself to have reached a conclusion inconsistent with that here under review in its affirmance without opinion (138 Fed. 2nd 512) of the Board of Tax Appeals in *Commissioner* v. *Estate of Ballard* (47 B. T. A. 784). The Court of Appeals for the Third Circuit (*Lloyd's Estate* v. *Commissioner,* 141 Fed. 2nd 758), in a careful and exhaustive opinion by Jones, C. J., expressly found that a *trust res* was no part of a decedent's estate where he had granted the life tenants a power of appointment, only upon non-exercise of which and possible failure of an alternative remainder would the corpus revert to the grantor. The doctrine of *Helvering* v. *Hallock* was deemed not to reach to property, th future enjoyment of which by the grantor-decedent was to rest

upon whether or not a life tenant chose to exercise his appointive power.

And the Board of Tax Appeals in a case wholly parallel to that at bar (*Estate of Henry* v. *Commissioner*, B. T. A. docket #109513), has taken the same view.

It is urged that no warrant exists for an extension of the doctrine to new fields, unnecessary to invade and destructive of constitutional safeguards.

(e) The Circuit Court of Appeals wrote with respect to the powers possessed by the wife:

> "If the powers are significant for any purpose, they merely add to the remoteness of the contingency upon which the *Hallock* doctrine depends."

We submit that no question of remoteness properly enters into the matter. The conception cannot be invoked except with respect to a contingency. A contingency is defined as a "possibility of happening" (Standard Dictionary). Neither in a legal nor every day sense is the exercise of the volition of a rational being a contingency. Here, the hope that the decedent might some day come into ownership of the contracts was conditioned upon his surviving his wife (a true contingency) plus her choosing to refrain from destroying the contracts during her lifetime (an act of conscious volition).

Thus, it was not a matter of his possessing a right which was remote. He had no right; for it was she and not he that possessed all the means of domination.

III

The decedent had not retained "the right to the income from the property".

The only contract which need here be considered is the so-called "annuity", No. 9,168,544. Obviously, there is no

trace of income for the decedent in the life contract, since the dividends were payable to the wife from its creation.

It has been noted that the annuity contract is sharply divisible into its two independent features. The wife may, without fear of restriction, surrender the contract at any time and receive for herself the same sum (denominated a "death benefit") during the decedent's lifetime that she was entitled to receive upon his death. Thereupon a fresh annuity contract would be issued to the decedent and continue to yield him a stipulated sum for the balance of his life.

The new contract, arising in his sole favor upon the surrender by the wife of that which is now before the Court, would have called for a slightly lower annual benefit to the husband, the decedent. It might, therefore, be asserted, but without justification, that the husband retained the right to this difference of income, amounting to $106.25 per annum, from the property which the Commissioner has included as taxable in his gross estate. Certainly the income payable to the husband under the fresh annuity contract which would have been issued had the wife surrendered the original contract, namely, $280.26 a year, is wholly separate from the property which has been taxed, for it continues notwithstanding the withdrawal of the so-called "death benefit" by the wife and the elimination of that portion of the principal from any ability to contribute income.

But the following considerations show, we submit, that the decedent had no right to enjoy any income derived from any portion of the property:

(a) That he had no *right* to income attributable to that portion of the principal which the wife could unrestrictedly withdraw is a necessary conclusion from the fact that she could by herself eliminate that part of his annuity by the mere act of surrendering the

contract and withdrawing the "death benefit". It seems clear that a "right" implies an enforcible interest. By the very terms of the contract this element of the annuity could be blotted out by the wife; her doing so would invade no right since the power is granted her specifically.

(b) The balance of the annuity, to which he would be entitled for life if she surrendered the contract, is obviously not derived from the principal which she had the power to draw down equally before or after his death; for her withdrawal of that principal would in no way affect it. It would flow from a new policy to be issued by the Society.

(c) She had powers which were even more persuasively inconsistent with the existence of any right to income on the part of the husband for, without surrendering the contract, she had the contractual authority, "subject to the Society's approval, to change to another form or plan of contract" the entire agreement bearing upon the annuity and the death benefit. There is no qualification upon this except the Society's approval. The decedent could not have blocked her action. It is apparent that it was in her power, therefore, so to amend the contract during the decedent's lifetime, without a surrender of the original document, as to eliminate entirely the annuity feature. It seems, therefore, idle to speak of any "right to the income from the property" when, whatever annuity was paid to him was not the result of any right to demand it on his part but the mere sufferance of his wife.

(d) Fundamental, however, is the question whether an annuity paid under a contract is *income derived from the property*—whether "income from the property" does not apply to its earnings rather than to a stipulated amount,—possibly more, possibly less, but wholly unlikely to be the same as the contractual sum periodically due. The Board of Tax Appeals in *Clise*

v. *Commissioner* (41 B. T. A. 820), answered this question in the negative, writing on page 824:

> "The property (money) which she was 'transferring' was irretrievably gone and for it she was getting a promise of an annuity, payment of which was not limited or related to income from the consideration which she paid, but was to be paid at all events."

The decision of the Board, although reversed on the ground that the decedent had retained an interest in the property transferred, was left undisturbed on the subject of income (122 Fed. (2d) 998). Seemingly of the same opinion are

> *Matter of Kohler*, 193 App. Div. (N. Y.) 8, 20;
> *Peek* v. *United States*, 38 Fed. Supp. 826, 827;
> *Matter of McComb*, 4 Bradf. 151.

Assuming that there was a retention of "the right to the income", it was not for the decedent's life or for any period not ascertainable without reference to his death, or for any period which does not in fact end before his death.

If there was a "right", it could have been terminated at any time by the wife. Such a right will not meet the statutory definition. As to this, the intention of Congress is made clear by the reports of the Senate Finance Committee on the Revenue Bill of 1932 when this feature was adopted. The pertinent portions read as follows:

> "The insertion of the words 'or for any period not ascertainable without reference to his death,' is to reach, for example, a transfer where decedent reserved to himself semiannual payments of the income of a trust which he had established, but with the provision that no part of the trust income between the last semiannual payment to him and his death should be paid to him or his estate, or where he reserves the income, not necessarily for the remainder of his life, but for a period in the ascertainment of which the date of his death was a necessary element.

"The insertion of the words 'or for any period which does not in fact end before his death,' which is to reach, for example, a transfer where decedent, 70 years old, reserves the income for an extended term of years and dies during the term, or where he is to have the income from and after the death of another person until his own death, and such other person predeceases him. This is a clarifying change and does not represent new matter."

Here the measure of time had no reference to his life. It was that period only during which the wife might choose to allow the annuity to continue.

Conclusion

No element implied or specified in Sec. 811(c) served to fasten to the decedent a tie to the property which would serve to render it part of his estate at death. It was error to include it in his gross estate. The judgment below should be reversed and the prayer of the complaint granted.

March 12, 1945.

Respectfully submitted,

Bondy & Schloss,
Attorneys for Petitioners,
285 Madison Avenue,
New York City.

Eugene L. Bondy,
of Counsel.

Appendix I

Section 302(c) of the Revenue Act of 1926, being Section 811(c) of the Internal Revenue Code.

(as amended by the Joint Resolution of March 3, 1931.)

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(c) *To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise,* in contemplation of or *intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property,* or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; *except in case of a bona fide sale for an adequate and full consideration in money or money's worth.* Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;

* * * * * * * * * * *

Treasury Regulation 80:

Art. 17 [as amended by T.D. 5008, 1940-2 Cum. Bull. 286, 287]. *Transfers conditioned upon survivorship.*— The statutory phrase "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer by the decedent prior to his death

(other than a bona fide sale for an adequate and full consideration in money or money's worth) whereby and to the extent that the beneficial title to the property transferred (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), is not to pass from the decedent to the donee unless the decedent dies before the donee or another person, or its passing is otherwise conditioned upon decedent's death; or, if title passed to the donee, it is to be defeated and the property is to revert to the decedent as his own should he survive the donee or another person, or the reverting of the property to the decedent is conditioned upon some other contingency terminable by his death. Since in such transfers the decedent's death is requisite to a termination of his interest in the property, it is unimportant whether his interest be denominated a reversion or a possibility of reverter, whether it arose by implication of law or by the express terms of the instrument of transfer, and whether the interest of the donee be contingent or vested subject to be divested, and the tax will apply, unless otherwise provided in the next succeeding paragraph, without regard to the time when the transfer was made, whether before or after the enactment of the Revenue Act of 1916. Thus, upon a transfer by a decedent of property in which an estate for life is given to one and an estate in remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remainder, if the life estate is then outstanding. The value of the outstanding life estate is not to be included in determining the value of the gross estate, unless that estate had been transferred in contemplation of the decedent's death, or

otherwise as to render it a part of the gross estate. If by reason of an election by the executor the valuation of the gross estate is governed by the provisions of article 11, adjustments in the value of such transferred estates may be required. (See article 15.)

Where the transfer was made during the period between November 11, 1935 (that being the date upon which the Supreme Court of the United States rendered its decisions in the cases of *Helvering* v. *St. Louis Union Trust Co.* (296 U. S. 39 [Ct. D. 1047, C. B. XIV-2, 339 (1935)]) and *Becker* v. *St. Louis Union Trust Co.* (296 U. S. 48 [Ct. D. 1046, C. B. XIV-2, 337 (1935)]) and January 29, 1940 (that being the date upon which such Court rendered its decisions in *Helvering* v. *Hallock* and companion cases (309 U. S. 106 [Ct. D. 1440, C. B. 1940-1, 223]), and the Commissioner, whose determination therein shall be conclusive, determines that such transfer is classifiable with the transfers involved in such two cases decided on November 11, 1935, rather than with the transfer involved in the case of *Klein* v. *United States* (283 U. S., 231 [Ct. D. 333, C. B. X-1, 462 (1931)]), previously decided by such Court, then the property so transferred shall not be included in the decedent's gross estate under the provisions of this article, if the following condition is also met: Such transfer shall have been finally treated for all gift tax purposes, both as to the calendar year of such transfer and subsequent calendar years, as a gift in an amount measured by the value of the property undiminished by reason of a provision in the instrument of transfer by which the property, in whole or in part, is to revert to the decedent should he survive the donee or another person, or the reverting thereof is conditioned upon some other contingency terminable by decedent's death.

ART. 18 [as amended by T. D. 4868, 1938-2 Cum. Bull. 355]. *Transfers with possession or enjoyment retained.*—

Appendix I

Except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the gross estate embraces (section 302 (c), as amended) all property transferred by the decedent, whether in trust or otherwise, if he retained or reserved the use, possession, right to the income, or other enjoyment of the transferred property, and if the transfer was made—

(1) At any time after 10.30 p. m., eastern standard time, March 3, 1931, and such retention or reservation is for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period; or

(2) At any time after 5 p. m., eastern standard time, June 6, 1932, and such retention or reservation is for any period mentioned in (1) or for any period not ascertainable without reference to his death.

A reservation for a "period not ascertainable without reference to his death" may be illustrated by a reservation of the right to receive, in quarterly payments, the income of the transferred property where none of the income between the last quarterly payment and decedent's death was to be received by him or his estate; or by a reservation of a life estate following a precedent estate for life or a term of years.

The use, possession, right to the income, or other enjoyment of the property, will be considered as having been retained by or reserved to the decedent to the extent that during any such period it is to be applied towards the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit.

If such retention or reservation is of a part only of the use, possession, income, or other enjoyment of the property, then only a corresponding proportion of the value of the property should be included in determining the value of the gross estate.

(See article 15.)

Appendix II

Pertinent Provisions of Contract No. 9,168,545 (Life)

Numbers in parenthesis indicate photostatic pages.

SUCCESSIVE OWNERS: The rights of Owner under the terms of this policy are vested in BEATRICE L. GOLDSTONE, wife of said MORRIS L. GOLDSTONE, only during her lifetime. Upon the death of said BEATRICE L. GOLDSTONE, prior to the death of said MORRIS L. GOLDSTONE, the said rights of Owner shall vest in said MORRIS L. GOLDSTONE. (2)

The proportion of divisible surplus accruing upon this policy shall be ascertained annually. At the end of thhe first and each subsequent policy year any surplus apportioned by the Society to this policy as a Dividend shall, at the option of the Owner be:

1. Paid in cash; or
2. Applied to the purchase of paid-up Additional Insurance, and the Owner may at any time surrender such Additional Insurance and receive the cash value thereof which shall not be less than the original cash dividend; or
3. Left to accumulate at 3% interest, compounded annually, and if in any year the Society declares that funds held under this Option shall receive interest in excess of 3% per annum the accumulation hereunder shall be increased by an Excess Interest Dividend in an amount to be determined and apportioned by the Society. Any dividend accumulations under this Option will be payable to the Owner on demand on any anniversary of the Register date of this policy. (3)

Appendix II

SPECIAL BENEFICIARY. If there is no written assignment of this policy in force and on file with the Society or if the only assignment in force and on file is to the Society as security for an advance, the Owner may while this policy is in force designate a special beneficiary or beneficiaries who shall be entitled to receive the net sum due upon the death of the insured and may from time to time change such beneficiary or beneficiaries. Such designation or change of special beneficiary shall be made by written request, upon the Society's blank, filed at its Home Office, but shall take effect, only upon the endorsement of the same hereon by the Society. (4)

The Owner (or assignee if any) while vested with the rights under the terms of this policy may, without the consent of the Insured, special beneficiary or any subsequent successive Owner, surrender, assign or pledge this policy and all rights hereunder or, subject to the Society's approval, change to another form or plan of insurance. An assignment by the Owner shall operate to exclude any and all rights of the Insured, special beneficiary or any subsequent successive Owner under this policy except that upon release of all outstanding assignments or upon reassignment to the Owner all rights under this policy shall be the same as if such assignments of said policy had not been made and that if assigned or pledged as collateral only by the Owner, the rights of the Insured, special beneficiary and any subsequent successive Owner shall be as set forth in this policy subject to such collateral assignment or pledge. (4)

LOANS. The Society, at any time while this policy is in force, will advance to the Owner on proper assignment

of this policy and on the sole security hereof, at 6% interest per annum payable annually on the anniversary of the Register date a sum which, with interest for the then current policy year, shall not exceed the cash value as stated in the following table. Interest if not paid when due shall be added to the existing loan and bear interest at the same rate. If the advance is for a purpose other than to pay premiums on policies in the Society, the granting of the same may be deferred by the Society for a period not exceeding ninety days after receipt of application therefor. Failure to repay such advance or to pay interest thereon shall not avoid this policy unless the total indebtedness hereon shall equal the total loan value, nor until thirty-one days after notice shall have been mailed to the Owner, and to the assignee of record, if any, at their addresses last known to the Society.

CASH SURRENDER VALUE. This policy, after being inforce for one year, may be surrendered by the Owner for its cash value, as shown in the opposite table.

No option of settlement elected by the Owner hereunder can be changed nor can any payment thereunder be commuted, except by the Owner's written order filed with the Society at its Home Office. ("Modes of Settlement Rider".)

PAYMENT AS MATURED ENDOWMENT. Whenever during the lifetime of the insured the reserve on this policy and on any dividend additions together with any dividend accumulation equals the face amount hereof, the Society, upon surrender of this policy with due release, will re-

gard this policy as a matured Endowment and will pay to the Owner the face amount of insurance hereunder less any indebtedness. (3)

MODES OF SETTLEMENT AT MATURITY OF POLICY.

The Owner may elect to have the net sum due and special beneficiary under said policy upon its maturity applied under one or more of the following optional modes of settlement in lieu of the lump sum provided for on the first page thereof, and in the absence of such an election by the Owner, the special beneficiary, after the Insured's death, may so elect. (Rider.)

Appendix III

Pertinent Provisions of
Contract #9,168,544 (Annuity).

The Equitable Life Assurance Society of the United States * * * hereby agrees to pay at its home office in the City of New York to Morris L. Goldstone (herein called the Annuitant) an annuity subject to the conditions hereinafter stated, in semi-annual payments of $368.51, each commencing with the twenty-eighth day of December, 1933, if the Annuitant is then living, and terminating with the last payment preceding the death of the Annuitant.

If the Annuitant dies while this contract is in force, the Society further agrees upon receipt of due proof of the Annuitant's death and the surrender of this contract, properly released, to pay to the beneficiaries as named in the Special Provision attached hereto, dated July 27th, 1933, and in accordance therewith, (with the right of the Annuitant's wife, Beatrice L. Goldstone, herein called the purchaser, during her lifetime and after her death, the Annuitant to change the beneficiary or assign this contract) Six Thousand and Seventy-one and 46/100 Dollars (herein called the death benefit), together with an additional sum equal to a fractional part of the Annuity payment proportionate to the period elapsed between the due date of the last Annuity payment made and the date of the Annuitant's death.

* * * *

The Purchaser, during her lifetime, without the consent of the Annuitant or beneficiary and after her death the Annuitant, without the consent of the beneficiary, may surrender this contract to the Society at any date upon which an annuity payment is due thereunder, and upon such surrender the Society, in addition to making the annuity payment then due, will

1) pay to the Purchaser or, after her death, the Annuitant, a cash surrender value of an amount equal

to the death benefit provided for above and will

2) issue to the Annuitant a paid-up non-participating Life Annuity Contract providing for Annuity payments of the reduced amount of Two Hundred Eighty and 26/100 Dollars cash, etc.

SPECIAL PROVISION:

The Purchaser (or assignee, if any, of all rights under this contract) may, without the consent of the Annuitant or beneficiary, surrender, assign or pledge this contract and all rights hereunder or, subject to the Society's approval, change to another form or plan of contract. An assignment of all rights under this contract by the Purchaser shall operate to exclude any and all rights of any beneficiary, or Annuitant under this contract except that upon release of all outstanding assignments or upon reassignment to the Purchaser all rights under this contract shall be the same as if such assignments of said contract had not been made and that if assigned or pledged as collateral only by the Purchaser, the rights of the Annuitant or beneficiary shall be as set forth in this contract subject to such collateral assignment or pledge. (2)

If the Purchaser be not living, and if there be no written assignment of this contract in force and on file with the Society, then the Annuitant (or assignee, if any, of all rights under this contract) may, without the consent of the beneficiary, surrender, assign or pledge this contract and all rights hereunder, or, subject to the Society's approval, change to another form or plan of contract. An assignment of all rights under this contract by the Annuitant shall operate to exclude any and all rights of the beneficiary under this contract except that upon release of all outstanding assignments or upon reassignment to the An-

nuitant all rights under this contract shall be the same as if such assignments of said contract had not been made and that if assigned or pledged as collateral only by the Annuitant, any equity remaining at the death of the Annuitant shall accrue to the beneficiary. (2)

PARTICIPATION IN DIVIDENDS. The proportion of divisible surplus accruing upon this contract shall be ascertained annually. At the end of the first and each subsequent contract year any surplus apportioned by the Society to this contract as a Dividend shall, at the option of the Purchaser, during her lifetime, without the consent of the Annuitant or beneficiary and after her death, the Annuitant, without the consent of the beneficiary, be

1. Paid in cash; or
2. Left to accumulate at 3% interest, compounded annually, and if in any year the Society declares that funds held under this Option shall receive interest in excess of 3% per annum the accumulation hereunder shall be increased by an Excess Interest Dividend in an amount to be determined and apportioned by the Society. Any Dividend accumulations under this Option will be payable to the Purchaser, or after her death, the Annuitant upon surrender of this contract or on demand on any prior anniversary of the Register date of this contract. (3)

LOANS. The Society, at any time while this contract is in force, will advance to the Purchaser, during her lifetime, without the consent of the Annuitant or beneficiary and after her death, the Annuitant, without the consent of the beneficiary, on proper assignment of this contract and on the sole security hereof, a sum which with interest

for one year shall not exceed the death benefit, less, any existing indebtedness to the Society on this contract. Interest shall be at the rate of 6% per annum and shall be payable on each anniversary of the Register date hereof. Interest, if not paid when due shall be added to the existing loan and bear interest at the same rate. If the advance is for a purpose other than to pay premiums on policies in the Society, the granting of the same may be deferred by the Society for a period not exceeding ninety days after receipt of application therefor. Failure to repay any advance or to pay interest thereon shall not avoid this contract unless the total indebtedness hereon shall equal or exceed the Death Benefit, nor until thirty-one days after notice shall have been mailed to the Purchaser, or after her death, the Annuitant, and to the assignee of record, if any, at their addresses last known to the Society. (3)

BENEFICIARY. If there is no written assignment of this contract in force and on file with the Society or if the only assignment in force and on file is to the Society as security for an advance, the Purchaser, during her lifetime, and after her death, the Annuitant, may from time to time, by written notice duly filed at the Society's Home Office, change the beneficiary, but such change shall take effect only upon its endorsement on this contract by the Society. (3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 699

BEATRICE L. GOLDSTONE and EUGENE L. BONDY, EXECUTORS OF THE ESTATE OF MORRIS L. GOLDSTONE, DECEASED, PETITIONERS,

v.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF OF PETITIONERS

BONDY & SCHLOSS,
Attorneys for Petitioners,
Office & P. O. Address,
285 Madison Avenue,
Borough of Manhattan,
City of New York.

EUGENE L. BONDY,
of Counsel.

INDEX

Cases Cited

	Page
Helvering v. Hallock, 309 U. S. 106	2
Klein v. United States, 283 U. S. 231	2
Tyler v. United States, 281 U. S. 497	4
United States v. Clifford, 309 U. S. 331	3
United States v. Jacobs, 306 U. S. 363	4

Statutes

N. Y. Insurance Law, L. 1939, ch. 882, Section 146	3
N. Y. Domestic-Relations Law, L. 1909, ch. 19, Sect. 50	4

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REPLY BRIEF OF PETITIONERS

This reply will attempt to avoid any repetition of the petitioners' main brief. It will refer to the pages of the brief submitted for the United States to which its comments apply and, where possible, will quote the opening words of the passage to which comment is directed.

p. 2: "*On June 29th, 1933, the decedent purchased etc.*"

The stipulation and findings do not justify this assertion. They go no further than that "the Society entered into two contracts". (R. 3) and that the decedent's check paid the consideration. From the outset the wife was the "Owner" and "Purchaser". The money may therefore be regarded as having been a gift; but the decedent never owned either contract.

p. 7 "In the *Le Gierse case etc.*" The only question there at issue, as we read it, was whether the forty thousand dollar insurance credit then allowed to the gross estate could be claimed where there was no insurance risk. There was no question that the proceeds, except for this, constituted an element of the gross estate, since the decedent who, at the age of 80, bought the contracts within a month of her death, retained indefeasibly the income for her life. It was in 1936 after the 1932 amendment of sec. 302(c) had made this controlling.

ps. 7-8 "*In Fidelity-Philadelphia Trust Company etc.*" The Court considered this case on a writ of certiorari, limited only to the question of the valuation. True, it was taken for granted that the remoteness of the decedent's contingent interest did not affect the application of *Klein* v. *United States*, 283 U. S. 231, and *Helvering* v. *Hallock*, 309 U. S. 106. If she "held the string", even though her reversion would come into effect only after the death of her two daughters and their young children, it was nevertheless a string. Our point is, of course, that here the only string was held by the wife and not by the decedent. Remoteness is not involved.

p. 9 The same applies with respect to *Commissioner* v. *Field*. Here, too, the only point was that of valuation.

p. 9 "*The decedent here retained a string etc.*"

p. 10 "* * * *the decedent nevertheless retained an interest* * * *".

p. 11 "*The decisive consideration is that only at the moment of his death did the husband's reversionary interest come to an end*".

The assertions of the respondent's brief, of which these are samples, all seem to beg the question. They have overlooked the fact that the wife might have completely excluded the decedent, a circumstance not present in any analogous case we have discovered in this Court. Thus, not only might she have surrendered both contracts but

she might have assigned them. If she had assigned the insurance contract, she would have excluded "any and all rights of the Insured (R. 29)". If she had assigned the Annuity contract, her act would "operate to exclude any and all rights of any Beneficiary or Annuitant under this contract (R. 33)". Only if she chose to accept a reassignment in either case would the old terms be reinstated.

Obviously, she was free to assign the Annuity contract at will and realize the price for her own benefit. While her assignment of the insurance contract was restricted by the New York Statute (N. Y. Insurance Law, L. 1939, ch. 882, Section 146) to persons with an insurable interest, she might well have made the assignment to the two daughters or to any others who were within that class; and the consideration might well have been in excess of the surrender value, taking into account the real value based on the decedent's then expectancy of life. In either event, then, even had she died before him, he would take no rights of Owner or Purchaser since, by the above quoted clauses, the assignments would exclude the decedent.

What control then did the decedent retain?

p. 10 "* * * *surrender by the wife during the decedent's lifetime would have been at variance with the essential purpose of the arrangement, which was in the nature of an investment to mature upon the decedent's death*".

This declaration needs support from the record and finds none. If it were in the nature of an investment by the decedent he would necessarily have provided an indestructible income for himself for his life. The decedent in the *Le Gierse* case did just that. Here the decedent "retained" nothing. The day after the contracts were issued to his wife, she might have "excluded" him completely in the manner provided by the very clauses of the contracts. Everything points to an outright gift in 1933. Such cases as *United States* v. *Clifford* (309 U. S. 331) have no application, for there an income was provided for the settlor's family by a short term trust with control in the settlor.

Here, no income was assured since the wife for a variety of reasons might have realized the cash value of the contracts and dissipated them at will. Her property is separate and free of the husband's control (N. Y. Domestic-Relations Law, L. 1909, ch. 19, sect. 50).

p. 10 "* * * *if she had so surrendered the contracts immediately prior to the decedent's death, she would have received some $5,000 less than she actually received when her husband died".* This argument would cast every insurance policy, wholly and absolutely owned by a wife, into the husband's estate. The result is contrary. The increase in value after death is not at the expense of the husband's estate but flows from the provisions of the contract itself. We are returned to the bare question again of who owns the contract.

p. 11 "*None of the proceeds which the wife received came to her as a result etc.*" They came to her by the very terms of the contracts. This criticism cannot affect the crucial question of who wholly owned and absolutely controlled the contracts.

p. 13 *Tyler* v. *United States*, 281 U. S. 497 and *United States* v. *Jacobs*, 306 U. S. 363, do not apply. In the first case, the wife only came by her absolute estate upon the death of her husband with whom she held the property by the entirety. In the *Jacobs* case, they were joint tenants and therefore specifically subject to the provisions of subdivision (e) of the section. The question involved was merely whether that Section of the Revenue Act of 1924 which included property held jointly by the decedent and another in a decedent's gross estate was constitutional if construed retroactively to embrace joint tenancies existing before its enactment. True, in the *Jacobs* case, the wife might have by partition severed and disposed of her half of the joint property; but she could not, as here, have completely alienated the property so as to exclude her husband during his lifetime and the peculiar point of the statute was that, despite the joint tenancy,

e entire asset was rendered part of the gross estate the decedent if he had paid the full consideration for as Jacobs had (306 U. S. 365-6). The joint tenancy *isted* at his death. He *was* a joint tenant. Only his eath there brought her into complete ownership of the intly held property. Here it was hers as fully while e lived and the decedent had neither title nor right.

p. 14 *"The fact that the wife might have cut the string immaterial if she did not do so"*. The respondent's eory is that the decedent held the string but that the ife might have cut it—a superb example by piling metahor upon metaphor. The figure so often used in the ases of a string retained by the decedent implies no more nd no less, we believe, than that the decedent had some ontrol. To say that the wife may cut the string which e holds is to concede, we submit, that the string was in er hands and not in his.

Certainly, as we pointed out in our original brief (p. 7), if the wife, possessing the right to acquire the economic benefits or to dispose of them by assignment, had lied, the value of these two contracts would have formed art of her gross estate. Are they at the same time included in the decedent's gross estate and in the wife's? And if they are, upon the simultaneous death of both of hem, are the proceeds taxable fully to both estates? There can be no division between the estates, it is assumed, since there is no joint tenancy. Since, then, the roperty would be apportioned to the wife's gross estate, t seems a reduction to the absurd to include them in that f the husband who had no control and might at her ree will have been "excluded."

The conclusion would seem to be that all the husband njoyed was an insubstantial hope, falling far short of the ignity of property or of any possibility of reverter.

p. 16 *"* * * the decedent actually received an annual eturn of 2.9% on his investment in the form of an annuity so long as he lived."*

p. 17 "* * * *The decedent actually received the income, etc.*".

This again begs the question. The test of the statute is not what the decedent received as an act of grace, but whether "he has *retained* for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death * * * the *right* to the income from the property". Here he retained nothing and had no rights. Every cent of his income from the so-called annuity contract might have been cut off at will by the wife. The insurance contract, which is separable in all respects, provided no income at all to him. The very quotation from the Senate Finance Committee Report at the top of the respondent's page 18 refers this clause to a situation where the decedent *reserves* the income for an extended term of years during which time he dies. The test is, therefore, not whether the decedent received an income by the indulgence of a third party, but whether he retained an indefeasible *right* to the income which could not be destroyed at another's whim.

Dated: April 4, 1945.

Respectfully submitted,

BONDY & SCHLOSS,
Attorneys for Petitioners,
Office & P. O. Address,
285 Madison Avenue,
Borough of Manhattan,
City of New York.

EUGENE L. BONDY,
of Counsel.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	2
Argument	4
Conclusion	7
Appendix	8

CITATIONS

Cases:	
Bailey v. *United States*, 31 F. Supp. 778, certiorari dismissed, 311 U. S. 721	6
Ballard; Estate of v. *Commissioner*, 47 B. T. A. 784, affirmed, 138 F. 2d 512	6
Commissioner v. *Washer*, 127 F. 2d 446, certiorari denied, 317 U. S. 653	5
Fidelity-Philadelphia Trust Co. v. *Rothensies*, 142 F. 2d 838	7
Field's Estate v. *Commissioner*, 144 F. 2d 62	7
Hassett v. *Welch*, 303 U. S. 303	5
Helvering v. *Hallock*, 309 U. S. 106	4, 5, 6
Helvering v. *Le Gierse*, 312 U. S. 531	4, 5
Lloyd v. *Commissioner*, 141 F. 2d 758	6
Statute:	
Revenue Act of 1926, c. 27, 44 Stat. 9:	
Sec. 302, as amended	4, 5, 8
Miscellaneous:	
1944–15 Int. Rev. Bull. 1	6
Treasury Regulations 80:	
Art. 17, as amended	9
Art. 18, as amended	11

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 699

BEATRICE L. GOLDSTONE AND EUGENE L. BONDY, EXECUTORS OF THE ESTATE OF MORRIS L. GOLDSTONE, DECEASED, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 20–26) is reported in 52 F. Supp. 704, and that of the Circuit Court of Appeals (R. 36–40) is reported in 144 F. 2d 373.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 28, 1944 (R. 40). The petition for a writ of certiorari was filed on

November 24, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Decedent, under contracts purchased from an insurance company but which concededly did not involve life insurance, was entitled to and received semi-annual annuity payments during his lifetime and had a contingent reversionary interest in the contracts if he survived his wife. The wife possessed but did not exercise all of the incidents of ownership in the contracts, including the right to terminate decedent's interest therein. The question is whether the proceeds of the contracts paid upon decedent's death are includible in his gross estate under Section 302 (c) of the Revenue Act of 1926, as amended.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, *infra*, pp. 8–13.

STATEMENT

The pertinent facts found by the District Court (R. 27–28) and stipulated by the parties (R. 10–13) may be summarized as follows:

On June 29, 1933, the decedent purchased two contracts from the Equitable Life Assurance Society of the United States for the aggregate amount of $26,500 (R. 12). One contract, for which a

single premium of $14,357.08 was paid, insured decedent's life for $18,928, payable upon death to his wife, or if she predeceased him, to their daughters. If all the beneficiaries predeceased decedent, the proceeds of the contract were to be paid to his executors or administrators. (R. 12, 21.)

A physical examination was not required of the decedent in connection with this contract. Instead, he was required to purchase the second contract which was designated an annuity contract. (R. 12.) A single premium of $12,142.92 was paid. This contract provided for semi-annual payments of $386.51 to be made to the decedent during his lifetime and for payment of $6,071.46 to his wife upon his death, or if she predeceased him, to the daughters, and if they were dead, to his estate. (R. 12, 21.)

Each of the contracts provided that the wife should possess all of the incidents of ownership therein, including the right to assign or surrender them and change beneficiaries. If the wife died before the decedent, these powers were to vest in him. (R. 12, 21.) It was conceded that the two contracts were not contracts of life insurance (R. 22).

The decedent was sixty-three years of age when the contracts were purchased (R. 21). He died on February 23, 1938, survived by his wife and daughters (R. 10). His wife had not surrendered, assigned or alienated either contract prior to his death (R. 12).

Upon the death of the husband, the Equitable Life Assurance Society paid the widow $6,071.46 under the annuity contract, $18,928 under the life contract and $182.24 as accumulated dividends, or a total of $25,181.70 (R. 16, 20, 37).

The Commissioner of Internal Revenue determined that the proceeds of the two contracts were includible in decedent's estate for estate tax purposes. A deficiency of $5,376.11 was assessed and paid. A claim for refund was filed. Upon rejection a suit for refund was brought in the District Court, and its decision sustaining the action of the Commissioner was affirmed by the Circuit Court of Appeals. (R. 37, 40.)

ARGUMENT

1. The Circuit Court of Appeals properly concluded that the two contracts issued by the Equitable Life Assurance Society, which concededly were not contracts of life insurance under *Helvering* v. *Le Gierse,* 312 U. S. 531, were transfers intended to take effect in possession or enjoyment at or after death within the meaning of Section 302 (c) of the Revenue Act of 1926, as amended (Appendix, *infra,* pp. 8–9) and as construed by *Helvering* v. *Hallock,* 309 U. S. 106.

While it is true that the decedent's wife had the power to change the beneficiaries or to surrender or assign the contracts and thus both terminate decedent's annuity payments and end his contingent reversionary interest, these rights

were never exercised. Moreover, the trial court found (R. 24) that it was not the purpose of the decedent in purchasing the contracts to have his wife exercise any of her rights prior to his death.[1] In any event, the possibility that the wife might exercise her right to terminate the reversionary interest was merely an additional factor affecting the contingent right of the decedent to regain control over the contracts and his investment therein. The application of the *Hallock* doctrine does not depend upon the degree of contingency or the remoteness of vesting or revesting. *Commissioner* v. *Washer,* 127 F. 2d 446 (C. C. A. 6th), certiorari denied, 317 U. S. 653.

2. The decision of the Circuit Court of Appeals can be sustained without reliance upon *Helvering* v. *Hallock.* The contracts, which must be viewed as a unit under *Helvering* v. *Le Gierse,* provide for semi-annual payments to the decedent of $386.51 during his lifetime. While the wife could have deprived her husband of the payments, this was not done. The decedent received the payments until his death in 1938. Therefore, since the contracts were issued in 1933 (cf. *Hassett* v. *Welch,* 303 U. S. 303), this case comes literally within the provision added to Section 302 (c) of the Revenue Act of 1926 by the Joint Resolution of March 3, 1931, as amended by Sec-

[1] Had the wife surrendered the contracts prior to decedent's death, she would have received $5,376.11 less than the amount she actually received at his death (R. 37).

tion 803 of the Revenue Act of 1932, pursuant to which transferred property is included in the gross estate where the transferor "retained * * * for any period which does not in fact end before his death * * * the right to the income from * * *" the property transferred.[2] (Appendix, *infra*, pp. 8–9.)

3. Although it is felt that the Circuit Court of Appeals properly considered the present case to be controlled by *Helvering* v. *Hallock*, the court reached a contrary conclusion with respect to similar facts in *Estate of Ballard* v. *Commissioner*, 47 B. T. A. 784, affirmed, 138 F. 2d 512 (C. C. A. 2d), where the husband's contingent reversionary interest could likewise have been terminated by the exercise of the wife's undisputed control over the trust property. The Commissioner acquiesced in the *Ballard* decision. 1944–15 Int. Rev. Bull. 1.

In this respect, the instant case is in harmony with *Bailey* v. *United States*, 31 F. Supp. 778 (C. Cls.), certiorari dismissed, 311 U. S. 721, but it is inconsistent with *Lloyd* v. *Commissioner*, 141 F. 2d 758 (C. C. A. 3d), where the court held the transfer not within the scope of the statute because the grantor's reversionary interest could have been defeated by action of the beneficiary.

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[2] This point of view was presented to the Circuit Court of Appeals by the Government although no mention thereof was made in the decision.

Similar questions are now pending before this Court in *Fidelity-Philadelphia Trust Co.* v. *Rothensies*, 142 F. 2d 838 (C. C. A. 3d), No. 263, this Term, and *Field's Estate* v. *Commissioner*, 144 F. 2d 62 (C. C. A. 2d), No. 578, this Term, which are to be argued in January 1945. However, those cases do not involve the exact question here presented as to the effect of a provision whereby the grantor's reversionary interest may be defeated by action of the beneficiary.

CONCLUSION

In view of the inconsistent decisions and the administrative difficulties, it is believed that an authoritative determination should be obtained, and consequently we do not oppose the granting of a writ of certiorari.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
GEORGE J. LAIKIN,
Special Assistants to the Attorney General.
WALTER J. CUMMINGS, JR.,
Attorney.

DECEMBER 1944.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302 [as amended by Section 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680]. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—

* * * * *

(c) [as amended by Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516, and by Section 803 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169]. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the

nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made, in contemplation of death within the meaning of this title.[1]

Treasury Regulations 80 (1937 ed.):

ART. 17 [as amended by T. D. 5008, 1940–2 Cum. Bull. 286, 287]. *Transfers conditioned upon survivorship.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer by the decedent prior to his death (other than a bona fide sale for an adequate and full consideration in money or money's worth) whereby and to the extent that the beneficial title to the property transferred (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), is not to pass from the decedent to the donee unless the decedent dies before the donee or another person, or its passing is otherwise conditioned upon decedent's death; or, if title passed to the donee, it is to be defeated and the property is to revert to the decedent as his own should he survive the donee or another person, or the reverting of the property to the decedent is conditioned upon some other contingency terminable by his death. Since in such transfers the decedent's death is requisite to a termination of his

[1] The italicized portion represents the amendment made by the Joint Resolution of March 3, 1931, as amended by Section 803 of the Revenue Act of 1932.

interest in the property, it is unimportant whether his interest be denominated a reversion or a possibility of reverter, whether it arose by implication of law or by the express terms of the instrument of transfer, and whether the interest of the donee be contingent or vested subject to be divested; and the tax will apply, unless otherwise provided in the next succeeding paragraph, without regard to the time when the transfer was made, whether before or after the enactment of the Revenue Act of 1916. Thus, upon a transfer by a decedent of property in which an estate for life is given to one and an estate in remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remainder, if the life estate is then outstanding. The value of the outstanding life estate is not to be included in determining the value of the gross estate, unless that estate had been transferred in contemplation of the decedent's death, or otherwise as to render it a part of the gross estate. If by reason of an election by the executor the valuation of the gross estate is governed by the provisions of article 11, adjustments in the values of such transferred estates may be required. (See article 15.)

Where the transfer was made during the period between November 11, 1935 (that being the date upon which the Supreme Court of the United States rendered its

decisions in the cases of *Helvering* v. *St. Louis Union Trust Co.* (296 U. S. 39 [Ct. D. 1047, C. B. XIV–2, 339 (1935)]) and *Becker* v. *St. Louis Union Trust Co.* (296 U. S. 48 [Ct. D. 1046, C. B. XIV–2, 337 (1935)]) and January 29, 1940 (that being the date upon which such Court rendered its decisions in *Helvering* v. *Hallock* and companion cases (309 U. S., 106 [Ct. D. 1440, C. B. 1940–1, 223]), and the Commissioner, whose determination therein shall be conclusive, determines that such transfer is classifiable with the transfers involved in such two cases decided on November 11, 1935, rather than with the transfer involved in the case of *Klein* v. *United States* (283 U. S., 231 [Ct. D. 333, C. B. X–1, 462 (1931)]), previously decided by such Court, then the property so transferred shall not be included in the decedant's gross estate under the provisions of this article, if the following condition is also met: Such transfer shall have been finally treated for all gift tax purposes, both as to the calendar year of such transfer and subsequent calendar years, as a gift in an amount measured by the value of the property undiminished by reason of a provision in the instrument of transfer by which the property, in whole or in part, is to revert to the decedent should he survive the donee or another person, or the reverting thereof is conditioned upon some other contingency terminable by decedent's death.

ART. 18 [as amended by T. D. 4868, 1938–2 Cum. Bull. 355]. *Transfers with possession or enjoyment retained.*—Except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the gross estate embraces

(section 302 (c), as amended) all property transferred by the decedent, whether in trust or otherwise, if he retained or reserved the use, possession, right to the income, or other enjoyment of the transferred property, and if the transfer was made—

(1) At any time after 10.30 p. m., eastern standard time, March 3, 1931, and such retention or reservation is for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period; or

(2) At any time after 5 p. m., eastern standard time, June 6, 1932, and such retention or reservation is for any period mentioned in (1) or for any period not ascertainable without reference to his death.

A reservation for a "period not ascertainable without reference to his death" may be illustrated by a reservation of the right to receive, in quarterly payments, the income of the transferred property where none of the income between the last quarterly payment and decedent's death was to be received by him or his estate; or by a reservation of a life estate following a precedent estate for life or a term of years.

The use, possession, right to the income, or other enjoyment of the property, will be considered as having been retained by or reserved to the decedent to the extent that during any such period it is to be applied towards the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit.

If such retention or reservation is of a part only of the use, possession, income, or other enjoyment of the property, then only a corresponding proportion of the value of the property should be included in determining the value of the gross estate.

(See article 15.)

U. S. GOVERNMENT PRINTING OFFICE: 1944

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	2
Summary of Argument	4
Argument:	
I. The proceeds of the contracts are includible in the gross estate under Section 302 (c) because there was a possibility of reversion	6
II. The proceeds are also taxable under Section 302 (c), as amended, because the decedent actually enjoyed the annuity payments until his death	15
Conclusion	19
Appendix	20

CITATIONS

Cases:	
Allen, Estate of v. *Commissioner*, 3 T. C. 844	14
Bailey v. *United States*, 31 F. Supp. 778, certiorari dismissed, 311 U. S. 721	12
Ballard, Estate of v. *Commissioner*, 47 B. T. A. 784, affirmed, 138 F. 2d 512	11
Bankers Trust Co. v. *Higgins*, 136 F. 2d 477	12
Biddle v. *Commissioner*, 3 T. C. 832	14
Chase National Bank v. *United States*, 278 U. S. 327	7, 19
Clark v. *Commissioner*, 47 B. T. A. 865	13
Commissioner v. *Clise*, 122 F. 2d 998, certiorari denied, 315 U. S. 821	7, 16
Commissioner v. *Estate of Edward T. Bedford*, No. 710, this Term	2
Commissioner v. *Field*, decided February 5, 1945	4, 6, 9, 12, 13
Commissioner v. *Flanders*, 111 F. 2d 117	12
Commissioner v. *Meyer*, 139 F. 2d 256	17
Commissioner v. *Wilder's Estate*, 118 F. 2d 281, certiorari denied, 314 U. S. 634	7, 16
Fidelity-Philadelphia Trust Co. v. *Rothensies*, decided February 5, 1945	4, 6, 7, 12, 13
Field's Estate v. *Commissioner*, 144 F. 2d 62, reversed February 5, 1945, No. 578, this Term	12
Goldsmith v. *Commissioner*, decided May 29, 1944	12

Cases—Continued. Page

Guggenheim v. *Rasquin*, 312 U. S. 254 10
Hassett v. *Welch*, 303 U. S. 303 16
Helvering v. *Bullard*, 303 U. S. 297 16
Helvering v. *Hallock*, 309 U. S. 106 ..... 6, 7, 8
Helvering v. *Le Gierse*, 312 U. S. 531 ..... 6, 7, 10, 16, 18
Helvering v. *Meredith*, 140 F. 2d 973 17
Helvering v. *Safe Deposit & Trust Co.*, 316 U. S. 56 13
Helvering v. *Stuart*, 317 U. S. 154 13
Henry v. *Commissioner*, decided January 16, 1943 11
Higgins v. *Commissioner*, 129 F. 2d 237, certiorari denied, 317 U. S. 658 17
Klein v. *United States*, 283 U. S. 231 8
Lloyd, Estate of v. *Commissioner*, 47 B. T. A. 349 14
Lloyd's Estate v. *Commissioner*, 141 F. 2d 758 ..... 12, 14
Mearkle's Estate v. *Commissioner*, 129 F. 2d 386 ..... 7, 16
Peek v. *United States*, 38 F. Supp. 826 16
Reynolds, Estate of v. *Commissioner*, 45 B. T. A. 44 17
Richardson v. *Commissioner*, 121 F. 2d 1, certiorari denied, 314 U. S. 684 13
Rogers, Estate of v. *Commissioner*, 320 U. S. 410 13
Saltonstall v. *Saltonstall*, 276 U. S. 260 19
Sanford, Estate of v. *Commissioner*, 308 U. S. 39 17
Tyler v. *United States*, 281 U. S. 497 ..... 13, 15, 18
United States v. *Jacobs*, 306 U. S. 363 ..... 13, 15, 18
Walker, Estate of v. *Commissioner*, 4 T. C. 390 14

Statutes:

Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 302, as amended 5, 6, 15, 20

Miscellaneous:

1942-2 Cum. Bull. 4 13
H. Rep. No. 708, 72d Cong., 1st Sess., pp. 46–47 (1939–1 Cum. Bull. (Part 2) 457) 17
1944–15 Int. Rev. Bull. 1 11
I Paul, Federal Estate and Gift Taxation:
Sec. 7.18 16
Sec. 10.08 ..... 7, 16, 17
Sec. 10.09 7
S. Rep. No. 665, 72d Cong., 1st Sess., pp. 49–50 (1939–1 Cum. Bull. (Part 2) 496) 17
Treasury Regulations 80 (1937 ed.):
Art. 17, as amended 21
Art. 18, as amended 21

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 699

BEATRICE L. GOLDSTONE AND EUGENE L. BONDY, EXECUTORS OF THE ESTATE OF MORRIS L. GOLDSTONE, DECEASED, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 14) is reported in 52 F. Supp. 704. The opinion of the Circuit Court of Appeals (R. 24) is reported in 144 F. 2d 373.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 28, 1944 (R. 28). The petition for a writ of certiorari was filed on November 24, 1944, and was granted on February 12,

1945 (R. 29).[1] The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the proceeds of certain contracts payable to his wife upon decedent's death are includible in his gross estate under Section 302 (c) of the Revenue Act of 1926, as amended.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, *infra*, pp. 20–24.

STATEMENT

The pertinent facts found by the District Court (R. 14–15, 19) and stipulated by the parties (R. 7–12) may be summarized as follows:

On June 29, 1933, the decedent purchased two contracts from the Equitable Life Assurance Society of the United States for the aggregate amount of $26,500 (R. 8–9). One contract, for which a single premium of $14,357.08 was paid, insured decedent's life for $18,928, payable upon death to his wife, or if she predeceased him, to their daughters. If all the beneficiaries predeceased decedent, the proceeds of the contract were

[1] The opinion of the Circuit Court of Appeals was filed on August 11, 1944 (R. 24). Hence the same question of whether the petition for certiorari was filed in time arises in this case as in *Commissioner* v. *Estate of Edward T. Bedford*, No. 710, this Term, where the Government contends that the petition was filed in time under similar circumstances.

to be paid to his executors or administrators. (R. 9, 15.)

A physical examination was not required of the decedent in connection with this contract. Instead, he was required to purchase the second contract which was designated an annuity contract. (R. 9.) A single premium of $12,142.92 was paid. This contract provided for semi-annual payments of $386.51 to be made to the decedent during his lifetime and for payment of $6,071.46 to his wife upon his death, or if she predeceased him, to the daughters, and if they were dead, to his estate. (R. 9, 15.)

Each contract provided that, during her lifetime, the wife should have the right to assign it, to borrow money on it, to receive dividends, to change the beneficiaries, and to surrender the contract and obtain its cash surrender value. If the wife should die before the decedent, however, these powers were to pass to him. (R. 9, 15.)

The decedent was sixty-three years of age when the contracts were purchased (R. 15). He died on February 23, 1938, survived by his wife and daughters (R. 8). His wife had not surrendered, assigned or alienated either contract prior to his death (R. 9).

Upon the death of the husband, the Equitable Life Assurance Society paid the widow $6,071.46 under the annuity contract, $18,928 under the life contract, and $182.24 as accumulated dividends, a total of $25,181.70 (R. 11, 25).

The Commissioner of Internal Revenue determined that the proceeds of the two contracts were includible in decedent's estate for estate tax purposes. A deficiency of $5,376.11 was assessed and paid. Upon rejection of a claim for refund, suit was brought in the District Court; its decision sustaining the action of the Commissioner (R. 19) was affirmed by the Circuit Court of Appeals for the Second Circuit (R. 28).

SUMMARY OF ARGUMENT

I

The decedent retained not only an annuity but also a contingent reversionary interest in the proceeds of the contracts. If he had survived his wife he could have exercised the attributes of ownership under the contracts, and if he had survived his wife and daughters the proceeds would have been payable to his estate when he died. While the wife was given the right during her lifetime to exercise incidents of ownership under the contracts and could have surrendered them for their cash value, she never did so; nor has it been shown that the parties ever contemplated that she would. Under the circumstances these powers of the wife, if significant at all, merely indicate the remoteness of the interest retained by the decedent.

Whatever doubts may previously have existed, *Fidelity-Philadelphia Trust Co.* v. *Rothensies,* No. 263, this Term, and *Commissioner* v. *Field,* No.

578, this Term, both decided February 5, 1945, establish that the retention of a reversionary interest, however remote, is sufficient to make applicable the provisions of Section 302 (c) of the Revenue Act of 1926, dealing with transfers intended to take effect in possession or enjoyment at or after the settlor's death. The decedent in effect retained the economic benefits from the property in the form of an annuity which was paid to him until his death, and not until then did the proceeds become payable to the widow. Not until death did the widow have the right actually to possess and enjoy the entire fund which became payable at death. Hence, the full proceeds are includible in the decedent's gross estate.

II

Since these contracts were taken out in 1933, the specific amendments to Section 302 (c) are also applicable. These amendments provide for inclusion in the gross estate of property donatively transferred where the decedent has retained for his life, or for any period which does not in fact end before his death, the possession or enjoyment of, or the right to the income from, such property. Since the decedent actually received an annual return upon his investment in the contracts for a period which did not in fact end before his death, the statute is applicable here. It is immaterial, in our view, that the wife, by exercising her powers, might have sur-

rendered the contracts prior to the decedent's death and thus have affected his interests thereunder.

ARGUMENT

I

THE PROCEEDS OF THE CONTRACTS ARE INCLUDIBLE IN THE GROSS ESTATE UNDER SECTION 302 (C) BECAUSE THERE WAS A POSSIBILITY OF REVERSION

In the instant case the decedent retained not only an annuity but also a contingent reversionary interest in the proceeds of the contracts; if he had survived his wife he could have exercised the attributes of ownership in the contracts, and if he had survived both his wife and daughters the proceeds would have been payable to his estate when he died. The wife never exercised any of her powers under the contracts prior to the death of the decedent. In these circumstances, the present case would appear to be controlled by *Helvering* v. *Le Gierse*, 312 U. S. 531; *Helvering* v. *Hallock*, 309 U. S. 106; *Fidelity-Philadelphia Trust Co.* v. *Rothensies*, No. 263, this Term, decided February 5, 1945; and *Commissioner* v. *Field*, No. 578, this Term, decided the same day. Under the principles established in these decisions, the entire proceeds of the contracts are includible in the gross estate under Section 302 (c) of the Revenue Act of 1926 (Appendix, *infra*, p. 20) as a transfer intended to take effect in possession or enjoyment at or after the decedent's death.

In the *Le Gierse* case, the Court held that a life insurance policy and an annuity policy issued at the same time should be considered together to determine whether there was any real insurance risk; that so considered there was no such risk; and that the "insurance" proceeds should therefore be included in the gross estate of the decedent as a transfer intended to take effect in possession or enjoyment at or after death within the meaning of Section 302 (c).[2]

In the *Hallock* case, the decedent had created a trust to pay the income to his wife for life, and upon her death to deliver the principal to the grantor, if living. If he should not then be living the property was to go to their children. The grantor predeceased his wife. The Court sustained the Commissioner's determination that the value of the corpus, less only the value of the wife's outstanding life estate, was properly includible in the gross estate as a transfer intended to take effect at or after the grantor's death.

In *Fidelity-Philadelphia Trust Co.* v. *Rothensies*, the decedent had created a trust to pay the income to the settlor during her life and at her

[2] See also *Chase National Bank* v. *United States*, 278 U. S. 327, 337; *Commissioner* v. *Clise*, 122 F. 2d 998 (C. C. A. 9th), certiorari denied, 315 U. S. 821; *Mearkle's Estate* v. *Commissioner*, 129 F. 2d 386 (C. C. A. 3d); *Commissioner* v. *Wilder's Estate*, 118 F. 2d 281 (C. C. A. 5th), certiorari denied, 314 U. S. 634; I Paul, Federal Estate and Gift Taxation, secs. 10.08–10.09, pp. 498–504.

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death to her two daughters during their respective lives. At the death of each daughter the corpus supporting her share of the income was to be paid to her descendants. If both daughters died without leaving surviving descendants, the corpus was to be paid to such persons as the settlor might appoint by will. The Court, following the rule of *Klein* v. *United States*, 283 U. S. 231, and *Helvering* v. *Hallock, supra*, held the full value of the corpus includible in the grantor's gross estate under Section 302 (c). In so holding, the Court stated:

> It is fruitless to speculate on the probabilities of the property being distributed under the contingent power of appointment. Indeed, such speculation is irrelevant to the measurement of estate tax liability. The application of this tax does not depend upon "elusive and subtle casuistries." *Helvering* v. *Hallock, supra*, 118. No more should the measure of the tax depend upon conjectures as to the propinquity or certainty of the decedent's reversionary interests. It is enough if he retains some contingent interest in the property until his death or thereafter, delaying until then the ripening of full dominion over the property by the beneficiaries. The value of the property subject to the contingency, rather than the actuarial or theoretical value of the possibility of the occurrence of the contingency, is the measure of the tax. That value is demonstrated by the consequences

> that would flow in this instance from the decedent's survival of her daughters and any of the latter's surviving descendants.

In the *Field* case, the decedent created a trust during his lifetime, reserving the income for life and also the right to get back the corpus if he should survive his two nieces. He did not survive them. The Court held that the full value of the trust property was includible in his gross estate under Section 302 (c). The Court referred to its holding in the *Fidelity-Philadelphia Trust Co.* case, and made the following additional observation:

> The estate tax is not based on the value of the reversionary interest of the decedent at the time of his death but on the value at the time of his death of the property to which that reversionary interest relates. It makes no difference how vested may be the remainder interests in the corpus or how remote or uncertain may be the decedent's reversionary interest. If the corpus does not shed the possibility of reversion until at or after the decedent's death, the value of the entire corpus on the date of death is taxable.

These decisions would appear to leave little doubt as to the correctness of the decision below. The decedent here retained a string upon the contracts which might have resulted in the restoration of complete domination over them. While the wife was given the power during

her lifetime to exercise certain incidents of ownership, including the right to surrender the contracts, the decedent nevertheless retained an interest sufficient to hold in suspense until his death the ultimate possession or enjoyment of the proceeds of the contracts. It would seem that surrender by the wife during the decedent's lifetime would have been at variance with the essential purpose of the arrangement, which was in the nature of an investment to mature upon the decedent's death (compare *Helvering* v. *Le Gierse, supra*). Indeed, if she had so surrendered the contracts immediately prior to the decedent's death, she would have received some $5000 less than she actually received when her husband died. (See fifth page of insurance contract, Exhibit B to stipulation of facts.) And the cash surrender value of a policy is not, of course, the true measure of its worth. *Guggenheim* v. *Rasquin*, 312 U. S. 254. This Court there said (p. 257) that—

> the owner of a fully paid life insurance policy has more than the mere right to surrender it; he has the right to retain it for its investment virtues and to receive the face amount of the policy upon the insured's death.

In other words, the surrender of the contracts by the wife here would have been at a sacrifice which she was apparently not prepared to make. As the Circuit Court of Appeals below observed (R. 39), "If the [wife's] powers are significant

for any purpose, they merely add to the remoteness" of the decedent's reversionary interest. The death of the husband was the operative fact which terminated all of his rights and enlarged those of his wife. None of the proceeds which the wife received came to her as the result of exercise of her powers under the contracts. The decisive consideration is that only at the moment of his death did the husband's reversionary interest come to an end. The transfer of the proceeds of the contracts thus took effect finally and definitely at the decedent's death, and hence falls within the established construction of Section 302 (c).

However, as was indicated in our memorandum in response to the petition for certiorari, the decisions in the lower courts have not been consistent in cases where a beneficiary has been given power to defeat the grantor's reversionary interest. In *Estate of Ballard* v. *Commissioner*, 47 B. T. A. 784, affirmed, 138 F. 2d 512 (C. C. A. 2d), it was held that in the circumstances the decedent's string on the trust property was a practical nullity and there was no sufficient basis for taxation under Section 302 (c). The Commissioner acquiesced in the *Ballard* decision (1944–15 Int. Rev. Bull. 1). We submit, however, that such acquiescence was improvident. The Tax Court has followed the *Ballard* decision in other similar cases (*Henry* v. *Commissioner*, decided January 16, 1943 (1943 P-H T. C. Memorandum Decisions, par. 43,023);

Goldsmith v. *Commissioner*, decided May 29, 1944 (1944 P-H T. C. Memorandum Decisions, par. 44,181)), and it was also followed by the Circuit Court of Appeals for the Third Circuit in *Lloyd's Estate* v. *Commissioner*, 141 F. 2d 758, where the grantor's son was given a power to defeat the reversionary interest by exercising a power of appointment. On the other hand, the Court of Claims in *Bailey* v. *United States*, 31 F. Supp. 778, certiorari dismissed, 311 U. S. 721, reached a conclusion in accord with the decision of the court below. It may be noted here that the decision of the Circuit Court of Appeals for the Second Circuit in the present case is inconsistent with its earlier decision in the *Ballard* case. This change in approach occurred even prior to the recent decisions of this Court dealing with the proper construction of Section 302 (c). Earlier decisions of the Second Circuit, such as *Commissioner* v. *Flanders*, 111 F. 2d 117; *Bankers Trust Co.* v. *Higgins*, 136 F. 2d 477; and *Field's Estate* v. *Commissioner*, 144 F. 2d 62 (reversed by this Court on February 5, 1945, No. 578, this Term), apparently went on the theory that only the interest which passed at death could be included in the gross estate as a transfer intended to take effect in possession or enjoyment at or after the grantor's death. But the decision below in this case proceeded from the premise—subsequently confirmed by this Court in the *Fidelity-Philadelphia* and *Field* cases—that the retention of a

possibility of reverter, however remote, is sufficient to justify taxability where the ultimate possession or enjoyment of the entire fund is actually kept in suspense until at or after the decedent's death.

It seems unnecessary to consider at length the nature and extent of the wife's powers under the contracts. Whatever may be their legal consequences (cf. *Helvering* v. *Safe Deposit & Trust Co.*, 316 U. S. 56, 58–59; *Helvering* v. *Stuart*, 317 U. S. 154, 165; *Estate of Rogers* v. *Commissioner*, 320 U. S. 410; *Richardson* v. *Commissioner*, 121 F. 2d 1 (C. C. A. 2d), certiorari denied, 314 U. S. 684; *Clark* v. *Commissioner*, 47 B. T. A. 865 (Acquiescence, 1942–2 Cum. Bull. 4)), it is clear that, under the *Field* case, it "makes no difference how vested may be the remainder interests in the corpus" if the grantor retained a reversionary interest, as he did here.

It may perhaps be argued that in the *Fidelity-Philadelphia* and *Field* cases the corpus could not have been distributed in the lifetime of the grantor, while in this case the wife, by taking appropriate action, could at her will have obtained at least part of what she ultimately received when her husband died and the contracts terminated. While we do not deny the possibility of such a distinction, we submit that it is without significance. Cf. *Tyler* v. *United States*, 281 U. S. 497; *United States* v. *Jacobs*, 306 U. S. 363. The controlling factor in all cases of this character is

the retention by the decedent of a string upon the corpus, and where that string exists at the moment of death, the statute is satisfied. The fact that the wife might have cut the string is immaterial if she did not in fact do so. See *Estate of Lloyd* v. *Commissioner*, 47 B. T. A. 349, 356.

In this connection we may refer to the course of decisions in the Tax Court on this question. It held originally that the retention of a remote reversionary interest is sufficient to impose taxability, even though there is also a possibility that the corpus may be distributed during the grantor's lifetime. See *Estate of Lloyd* v. *Commissioner*, 47 B. T. A. 349, 356. However, after its ruling in the *Lloyd* case was reversed by the Circuit Court of Appeals for the Third Circuit, 141 F. 2d 758, the Tax Court changed its views and held transfers non-taxable under Section 302 (c) in analogous situations. *Biddle* v. *Commissioner*, 3 T. C. 832, *Estate of Allen* v. *Commissioner*, 3 T. C. 844, both on appeal pending the outcome of the instant case. In a more recent case, *Estate of Walker* v. *Commissioner*, 4 T. C. 390, the Tax Court seems to have reverted to its original position.[3]

In summary, therefore, we submit that even though there is a possibility under the terms of

[3] The Tax Court there attempted to distinguish its earlier decisions in the *Biddle* and *Allen* cases upon the ground of remoteness but, as has been stated, such a distinction is no longer tenable under the principles established in the *Fidelity-Philadelphia* and *Field* cases.

a transfer for the property to be delivered completely and irrevocably to the ultimate taker during the lifetime of the grantor, nevertheless where there is also a possibility that it may revert to the grantor or his estate, and such possibility has not been extinguished prior to the moment of death, then the property is includible under Section 302 (c). And this is particularly so where, as here, the death of the decedent enlarged the rights of the beneficiary. Cf. *Tyler* v. *United States, supra; United States* v. *Jacobs, supra.*

II

THE PROCEEDS ARE ALSO TAXABLE UNDER SECTION 302 (C), AS AMENDED, BECAUSE THE DECEDENT ACTUALLY ENJOYED THE ANNUITY PAYMENTS UNTIL HIS DEATH

In point I we have relied upon the general provision of the statute as to transfers which take effect in possession or enjoyment at or after the grantor's death. This provision has appeared in the law ever since the first federal estate tax statute was enacted in 1916. It applies both to transfers made prior to and after the amendments of 1931 and 1932 (see Appendix, *infra,* p. 20). These amendments provide specifically, however, for the inclusion of interests of which the decedent has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period which does not in fact end before his death the possession or enjoyment of, or the right to the income from, the property. While these specific amendments are not retro-

actively applicable to transfers made prior to their passage (*Hassett* v. *Welch*, 303 U. S. 303), they are valid as to subsequent transfers (*Helvering* v. *Bullard*, 303 U. S. 297). Since the instant contracts were made in 1933, they are subject to the 1931 and 1932 amendments.

We submit that the amendments apply in this case to impose taxability because the decedent actually received an annual return of 2.9% on his investment in the form of an annuity so long as he lived. Here, as in the *Le Gierse* case, *supra*, the contracts were comparable in effect to a transfer in trust with a life interest reserved to the grantor. The rationale of the decision in the *Le Gierse* case is that such a transaction is in essence an investment by which the settlor secures a low rate of return in the nature of income for life, together with the undertaking of the insurance company to transfer the proceeds to the objects of his bounty at or after his death. See also *Commissioner* v. *Clise*, *supra*; *Mearkle's Estate* v. *Commissioner*, *supra*; *Commissioner* v. *Wilder's Estate*, *supra*; *Peek* v. *United States*, 38 F. Supp. 826 (E. D. Pa.); I Paul, Federal Estate and Gift Taxation, secs. 7.18, 10.03, pp. 352, 498–500. The decedent here actually received the economic benefits from the property during his lifetime. In the circumstances, we submit that

the transfer comes within the specific provisions of the 1931 and 1932 amendments.[4]

It is true, of course, that prior to her husband's death the wife could have brought to fruition the potential rights which she had under the contracts.[5] But she did not do so, and since the decedent actually received the income and enjoyed the economic benefits from the property for a period which did not in fact end before his death, we believe that the amendments apply. In this connection, the Court's attention is directed to the Committee Reports on the 1932 amendment (H. Rep. No. 708, 72d Cong., 1st Sess., pp. 46–47 (1939–1 Cum. Bull. (Part 2) 457, 490–491); S. Rep. No. 665, 72d Cong., 1st Sess., pp. 49–50

[4] The estate and income tax laws are not completely correlated or integrated (*Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 47–48; *Higgins* v. *Commissioner*, 129 F. 2d 237, 240 (C. C. A. 1), certiorari denied, 317 U. S. 658), and whatever may be the income tax consequences flowing from a combination of contracts such as here involved (see *Commissioner* v. *Meyer*, 139 F. 2d 256 (C. C. A. 6); *Helvering* v. *Meredith*, 140 F. 2d 973 (C. C. A. 8)), it seems clear that under the *LeGierse* case the contracts must be considered together for estate tax purposes and when so considered the "annuity" received by the decedent during his lifetime was the substantial equivalent of the income for life within the meaning of the law. See *Estate of Reynolds* v. *Commissioner*, 45 B. T. A. 44; I Paul, Federal Estate and Gift Taxation, sec. 10.08, p. 499.

[5] It will be noted from page 1 of the annuity contract, of which a photostatic copy has been submitted with the record, that even if the wife had surrendered the contract, the husband would still have been entitled to receive a reduced annuity during his lifetime.

(1939–1 Cum. Bull. (Part 2) 496, 532), which state in part as follows:

> The insertion of the words "or for any period which does not in fact end before his death," which is to reach, for example, a transfer where decedent, 70 years old, reserves the income for an extended term of years and dies during the term, or where he is to have the income from and after the death of another person until his own death, and such other person predeceases him. This is a clarifying change and does not represent new matter.

This example indicates that Congress intended to look to the facts as they existed at the time of the decedent's death, regardless of what might have happened had a beneficiary or some other person previously exercised some right under the instrument of transfer. A similar rationale appears to underlie decisions of this Court in such cases as *Helvering* v. *Le Gierse, supra; United States* v. *Jacobs, supra; Tyler* v. *United States, supra.* In the *Jacobs* case, this Court said (p. 371):

> Until the death of her co-tenant, the wife could have severed the joint tenancy and thus have escaped the application of the estate tax of which she complains. Upon the death of her co-tenant she for the first time became possessed of the sole right to sell the entire property without risk of loss which might have resulted from partition

or separate sale of her interest while decedent lived. There was—at his death—a distinct shifting of economic interest,[6] a decided change for the survivor's benefit.

We submit, therefore, that the decision below may be sustained not only under the broad provision of the statute relating to transfers taking effect in possession or enjoyment at or after the grantor's death, but also under the specific amendments relating to the retention of income for life or for a period which does not in fact end before the grantor's death.

CONCLUSION

For the reasons stated, the judgment of the court below should be affirmed.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
L. W. POST,
Special Assistants to the Attorney General.

MARCH 1945.

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[6] Citing *Chase National Bank* v. *United States*, 278 U. S. 327, 338; *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 271.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302 [as amended by Section 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680]. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—

* * * * *

(c) [as amended by Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516, and by Section 803 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169]. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two

years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.[1]

Treasury Regulations 80 (1937 ed.):

ART. 17 [as amended by T. D. 5008, 1940–2 Cum. Bull. 286, 287]. *Transfers conditioned upon survivorship.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer by the decedent prior to his death (other than a bona fide sale for an adequate and full consideration in money or money's worth) whereby and to the extent that the beneficial title to the property transferred (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), is not to pass from the decedent to the donee unless the decedent dies before the donee or another person, or its passing is otherwise conditioned upon decedent's death; or, if title passed to the donee, it is to be defeated and the property is to revert to the decedent as his own should he survive the donee or another person, or the reverting of the property to the decedent is conditioned upon some other contingency terminable by his death. Since in such transfers the decedent's death is requisite to a termination of his interest in the property, it is unimportant whether his interest be denominated a reversion or a possibility of reverter, whether it arose by implication of law or by the

[1] The italicized portion represents the amendment made by the Joint Resolution of March 3, 1931, as amended by Section 803 of the Revenue Act of 1932.

express terms of the instrument of transfer, and whether the interest of the donee be contingent or vested subject to be divested, and the tax will apply, unless otherwise provided in the next succeeding paragraph, without regard to the time when the transfer was made, whether before or after the enactment of the Revenue Act of 1916. Thus, upon a transfer by a decedent of property in which an estate for life is given to one and an estate in remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remainder, if the life estate is then outstanding. The value of the outstanding life estate is not to be included in determining the value of the gross estate, unless that estate had been transferred in contemplation of the decedent's death, or otherwise as to render it a part of the gross estate. If by reason of an election by the executor the valuation of the gross estate is governed by the provisions of article 11, adjustments in the values of such transferred estates may be required. (See article 15.)

Where the transfer was made during the period between November 11, 1935 (that being the date upon which the Supreme Court of the United States rendered its decisions in the cases of *Helvering* v. *St. Louis Union Trust Co.* (296 U. S. 39 [Ct. D. 1047, C. B. XIV–2, 339 (1935)]) and *Becker* v. *St. Louis Union Trust Co.* (296 U. S. 48 [Ct. D. 1046, C. B. XIV–2, 337 (1935)]) and January 29, 1940 (that being

the date upon which such Court rendered its decisions in *Helvering* v. *Hallock* and companion cases (309 U. S., 106 [Ct. D. 1440, C. B. 1940–1, 223]), and the Commissioner, whose determination therein shall be conclusive, determines that such transfer is classifiable with the transfers involved in such two cases decided on November 11, 1935, rather than with the transfer involved in the case of *Klein* v. *United States* (283 U. S., 231 [Ct. D. 333, C. B. X–1, 462 (1931)]), previously decided by such Court, then the property so transferred shall not be included in the decedent's gross estate under the provisions of this article, if the following condition is also met: Such transfer shall have been finally treated for all gift tax purposes, both as to the calendar year of such transfer and subsequent calendar years, as a gift in an amount measured by the value of the property undiminished by reason of a provision in the instrument of transfer by which the property, in whole or in part, is to revert to the decedent should he survive the donee or another person, or the reverting thereof is conditioned upon some other contingency terminable by decedent's death.

ART. 18 [as amended by T. D. 4868, 1938–2 Cum. Bull. 355]. *Transfers with possession or enjoyment retained.*—Except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the gross estate embraces (section 302 (c), as amended) all property transferred by the decedent, whether in trust or otherwise, if he retained or reserved the use, possession, right to the income, or other enjoyment of the transferred property, and if the transfer was made—

(1) At any time after 10.30 p. m., eastern standard time, March 3, 1931, and such retention or reservation is for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period; or

(2) At any time after 5 p. m., eastern standard time, June 6, 1932, and such retention or reservation is for any period mentioned in (1) or for any period not ascertainable without reference to his death.

A reservation for a "period not ascertainable without reference to his death" may be illustrated by a reservation of the right to receive, in quarterly payments, the income of the transferred property where none of the income between the last quarterly payment and decedent's death was to be received by him or his estate; or by a reservation of a life estate following a precedent estate for life or a term of years.

The use, possession, right to the income, or other enjoyment of the property, will be considered as having been retained by or reserved to the decedent to the extent that during any such period it is to be applied towards the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit.

If such retention or reservation is of a part only of the use, possession, income, or other enjoyment of the property, then only a corresponding proportion of the value of the property should be included in determining the value of the gross estate.

(See article 15.)

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SUPREME COURT OF THE UNITED STATES.

No. 699.—October Term, 1944.

Beatrice L. Goldstone and Eugene L. Bondy, Executors of the Estate of Morris L. Goldstone, Deceased, Petitioners, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 11, 1945.]

Mr. Justice Murphy delivered the opinion of the Court.

The question here is whether the proceeds of certain contracts payable upon the death of the decedent to his wife are includible in his gross estate for estate tax purposes under Section 302(c) of the Revenue Act of 1926, as amended, Internal Revenue Code § 811(c).[1]

On June 29, 1933, the Equitable Life Assurance Society of the United States issued two contracts for which the decedent paid sums aggregating $26,500:

(1) The first contract, for which the decedent paid a single premium of $14,357.08, insured the decedent's life for $18,928, payable upon death to his wife or, if she predeceased him, to their daughters. If all the beneficiaries predeceased the decedent, the proceeds of the contract were to be paid to his executors or administrators. In lieu of a physical examination in connection with the issuance of this contract, decedent was required to purchase a second or an annuity contract.

(2) Under the annuity contract, the decedent paid a single premium of $12,142.92. The contract provided for semi-annual payments of $386.51 to be made to the decedent during his lifetime and for payment of $6,071.46 to his wife upon his death or,

[1] "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death . . ."

if she predeceased him, to their daughters or, if they were dead, to his estate.

By the terms of each contract the wife had the unrestricted right to assign it, to borrow money on it, to receive dividends, to change the beneficiaries and to surrender the contract and obtain the surrender value thereof. The contracts designated her as the "Owner" or "Purchaser," the decedent being called the "Insured" or "Annuitant." In the event that the wife should predecease the decedent, the contracts provided that all of the enumerated powers were to vest in the decedent to the extent that such powers had not otherwise been exercised by the wife.

The decedent was 63 years old when the contracts were issued. He died nearly five years later, on February 23, 1938, survived by his wife and daughters. His wife had not surrendered, assigned or alienated either contract prior to his death. The Equitable Life Assurance Society thereupon paid the widow $6,071.46 under the annuity contract, $18,928 under the life contract and $182.24 as accumulated dividends, making a total of $25,181.70.

On these facts the Commissioner of Internal Revenue determined that the proceeds of the two contracts were includible in decedent's estate for estate tax purposes. The petitioners, as executors of the estate, were assessed a deficiency of $5,376.11. After paying that amount they filed a claim for refund. The claim was rejected. They then brought this suit for refund. The District Court sustained the action of the Commissioner and dismissed the complaint. 52 F. Supp. 704. The Second Circuit Court of Appeals affirmed this judgment. 144 F. 2d 373. An apparent conflict of authority among lower courts on the question presented led us to grant certiorari.[2]

Helvering v. *Le Gierse*, 312 U. S. 531, makes it plain that these two contracts, which must be considered together, contain none of the true elements of insurance risk. Section 302(g) of the Act, relating to amounts receivable "as insurance under policies taken out by the decedent upon his own life," is therefore inapplicable. The sole question there is [illegible]

[2] The judgment below is stated by the United States to be inconsistent with the result reached in Lloyd's Estate *v.* Commissioner, 141 F. 2d 758 (C. C. A. 3) and to be in harmony with Bailey *v.* United States, 31 F. Supp. 778 (Ct. Cls.). The United States also claims that the result below is inconsistent with the same court's prior affirmance of Estate of Ballard *v.* Commissioner, 47 B. T. A. 784, affirmed, 138 F. 2d 512 (C. C. A. 2). In view of the manner of our disposition of the instant case, however, we have no occasion to determine whether these asserted conflicts exist or whether the decision here necessarily controls the factual situations presented in these other cases.

are includible in the decedent's gross estate under Section 302(c) as the subject of a transfer intended to take effect in possession or enjoyment at or after the decedent's death. That question we answer in the affirmative.

Section 302(c), as demonstrated by *Helvering* v. *Hallock*, 309 U. S. 106, reaches all *inter vivos* transfers which may be resorted to, as a substitute for a will, in making dispositions of property operative at death. It thus sweeps into the gross estate all property the ultimate possession or enjoyment of which is held in suspense until the moment of the decedent's death or thereafter. *Fidelity-Philadelphia Trust Co.* v. *Rothensies*, 324 U. S. 108, 111. In so doing, Section 302(c) pierces all the verbiage of "unwitty diversities of the law of property." *Helvering* v. *Hallock, supra,* 118. Testamentary dispositions of an *inter vivos* nature cannot escape the force of this section by hiding behind legal niceties contained in devices and forms created by conveyancers.

In this instance the decedent carefully procured the issuance of two contracts in his wife's name without possessing for a measureable period most of the usual attributes of ownership over the contracts. But this procedure does not conceal the fact that decedent used these contracts as a means of effecting a transfer of approximately $25,000 of his estate to the natural objects of his bounty. Nor does it negative the fact that this *inter vivos* transfer possessed all the indicia of a testamentary disposition. There was, in other words, a "transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another." *Chase National Bank* v. *United States*, 278 U. S. 327, 337. Section 302(c) must therefore be brought to bear.

The decedent, in making disposition of $25,000 of his property through these two contracts, retained a valuable interest in that amount which was not extinguished until he died. He retained not only the right to semi-annual payments under the annuity contract but also a contingent reversionary interest in the entire proceeds of both contracts. Had he survived his wife he could have exercised the attributes of ownership over the contracts, changing the beneficiaries or surrendering the contracts as he saw fit. If he had survived both his wife and his daughters the proceeds of the two contracts would automatically have been payable to his estate when he died. Thus the ultimate disposition of the

proceeds of the contracts was suspended until the moment of decedent's death. Only then did the respective interests of the wife and daughters become fixed; only then were their interests freed from the contingency of the decedent's survival. His death was the decisive fact that terminated all of his potential rights and insured the complete ripening of the wife's interests. The transfer of the proceeds of the contracts having been effectuated finally and definitely at the decedent's death, as in the *Hallock* case, Section 302(c) requires that those proceeds be included within the decedent's gross estate.

This conclusion is unaltered by the fact that the wife had the unrestricted power during the decedent's lifetime to exercise many important incidents of ownership over the contracts, including the power to terminate the decedent's reversionary interest in the proceeds. Whatever the likelihood of the exercise of this power, it is a fact that the wife did not change the beneficiaries or surrender the contracts so as to destroy decedent's reversionary interest. The string that the decedent retained over the proceeds of the contracts until the moment of his death was no less real or significant because of the wife's unused power to sever it at any time.

The essential element in this case, therefore, is the decedent's possession of a reversionary interest at the time of his death, delaying until then the determination of the ultimate possession or enjoyment of the property. The existence of such an interest constitutes an important incident of ownership sufficient by itself to support the imposition of the estate tax. *Helvering* v. *Hallock*, *supra*. The indefeasibility of that interest prior to death or the decedent's possession of other powers of ownership is unnecessary and indecisive of estate tax liability.

The disappearance of a decedent's reversionary interest, together with the resulting estate tax liability, prior to death through events beyond the decedent's control is a possibility in many situations such as the one in issue.[3] Likewise a reversionary in-

[3] Thus, in Fidelity-Philadelphia Trust Co. v. Rothensies, 324 U. S. 108, the decedent's contingent power of appointment was exercisable only if her two daughters died before her and left no surviving descendants. If the daughters died first but left surviving descendants, it would be certain before the decedent's death that her power of appointment would be nugatory. But such a contingency did not happen. At the time when the decedent died there was still the possibility that her power of appointment might be effective. ~~Hence the estate tax liability properly attached to the decedent's possession of that power at the moment of her death.~~ The fact that the power of appointment might have been destroyed prior to the decedent's death did not prevent the imposition of the estate tax. The decedent's death was still the decisive factor which enlarged and matured the interests of the daughters.

terest may become vested prior to a decedent's death because of the occurrence of other events beyond the realm of the decedent's volition and unconnected in any way with his death. But the imposition and computation of the estate tax are based upon the interests in actual existence at the time of the decedent's death. It follows that only those events that actually occurred prior to that moment can be considered in determining the existence and value of the taxable interests. Events that might have but failed to take place so as to erase a decedent's reversionary interest must be ignored; such unrealized possibilities, if significant at all, only add to the remoteness of the reversionary interest.

In our view of the case we need not consider the alternative argument urged by the United States to the effect that the specific amendments to Section 302(c) are also applicable since the decedent actually received an annual return from the contracts for a period which did not in fact end before his death. Nor do we reach any questions of valuation of the decedent's reversionary interest such as those which were decided in *Fidelity-Philadelphia Trust Co.* v. *Rothensies, supra,* and *Commissioner* v. *Estate of Field,* 324 U. S. 113.

Affirmed.

Mr. Justice Roberts.

I think the judgment should be reversed.

The court's decision repudiates *Helvering* v. *Hallock,* 309 U. S. 106, and other cases which have applied its reasoning. We have recently been told that the question whether, within the intent of the Revenue Acts, a transfer is "intended to take effect in possession or enjoyment at or after" the grantor's death is to be decided not by the terminology of conveyancing or the ancient real property law respecting vested and contingent estates, possibilities of reverter, and the like. We have been warned that the taxpayer and his estate must have regard to substance rather than to form, in answering the question whether the transfer becomes complete only at the transferor's death. I have assumed that the tax gatherer could not ignore the same test. Here I think the Commissioner is permitted to do just that. In order to reach substance in disregard of form, this court only recently has treated two independent contracts, one for insurance and the

other for an annuity, as constituting but a single transaction and amounting to a gift in favor of the beneficiary of the insurance policy. *Helvering* v. *Le Gierse*, 312 U. S. 531.

The transaction under review in the present case is a common one. Where an applicant for insurance is beyond the age at which a company will underwrite the risk, life insurance may be obtained by purchasing an annuity, which diminishes or eliminates risk of serious loss to the company by the early death of the insured. Here the decedent, a man of about sixty-three, in good health, and with apparently no contemplation of early death, consummated such an arrangement with an insurer. I think it demonstrable that the transaction as respects the beneficiary, his wife, was no different in substance or effect than an outright gift of money or property to her.

The decedent paid some $14,000 as a single premium for a policy by which the insurer agreed to pay some $18,000 to the beneficiaries named, that is, to his wife, if living, if she were dead, to his two daughters. The policy was issued to the wife and designated her as the owner of it. She had the following powers: To change the beneficiary without the husband's consent, to surrender the contract, assign or pledge it without his consent or that of any subsequent owner, change the form or plan of insurance (without reference to the insured, any beneficiary or subsequent owner), to surrender the contract and receive a specified cash value, to borrow on the policy at her sole election, to receive the dividends in cash or accumulate them to purchase additional insurance, in either case for her own use. If she exercised none of these rights the decedent would have become, at her death, if he were then living, the owner of the policy in her place and stead.

It is evident that if the policy be treated as an item of property, she had sole, full and untrammelled dominion over it and its proceeds. She was in truth, and not by any fiction, absolute owner of the property. I cannot distinguish this case from one in which a husband, not in contemplation of death, conveys money or property, real or personal, in fee simple to his wife or to any other relative. For, in such a case, all, or a portion of the property, may, upon the death of the donee, descend to the donor under the intestate laws, and both parties to the transaction know this to be the fact. Notwithstanding then that, under the law,

the wife may, until her death, spend, convey, mortgage or dispose of the property, I suppose it will be held that, inasmuch as all or some of it will descend to him if she omits so to do, he will be held, within the meaning of the statute, to have made a conveyance to take effect at his death because the only way he can avoid inheriting it from the donee is to die. Apparently courts are only to look to the realities of the situation, the essential nature of the ownership of the donee, where that spells taxability, but are to ignore the true character of the donee's untrammelled power over the subject matter of the gift where so to do spells taxability.

For the annuity purchased by the decedent he gave his check for the sum of $12,000. The contract describes his wife as the purchaser. Except for an annuity of a few hundred dollars per annum, payable to the decedent and subject to reduction under the terms of the contract, the wife's rights were again absolute. Upon the death of the decedent she was to receive a death benefit of some $6,000, but she might obtain this benefit at any time during his life, without his consent, and without other condition, upon mere surrender of the contract. Such surrender she might make without anyone's consent. She might, without decedent's consent, change to another form of plan or contract, or change the beneficiary, or assign the contract, might receive the dividends or allow them to accumulate, borrow money on the contract, and elect a mode of settlement thereunder. Her assignment of the contract might, if she so elected, exclude all rights of any beneficiary or annuitant under it. Here again, a small annuity, payable to the decedent only so long as his wife permitted, was the sole element of interest remaining in the decedent. The property was subject to the wife's dominion and hers alone.

To say that the decedent here retained an interest which passed at his death is to fly in the face of the facts. It is to say that, although we know the donee was as free to deal with the property as if she were described, in accordance with the niceties of conveyancing, or the ancient law of estates, as the owner in fee simple, yet this reality is to be ignored for the purpose of finding that the decedent gave her something less than absolute and full ownership of the property by enabling her to do exactly as she pleased with it; that the so-called "string" which he retained upon the property need not have the quality of a tie that binds.

Mr. Justice DOUGLAS joins in this opinion.